No. 2603

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC POWER COMPANY
(a corporation),
Plaintiff in Error,

vs.

P. R. SHEAFF,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE STATE OF NEVADA.

BRIEF FOR PLAINTIFF IN ERROR.

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Filed this.....day of September, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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This action was brought to recover damages for personal injuries. The defendant in error obtained a verdict and judgment in the United States District Court for the State of Nevada for the sum of $15,000.00. A motion for new trial was made and denied. The case is now in this court on writ of error.

Statement of Facts.

Prior to the 18th day of July, 1911, the plaintiff in error, a California corporation, was con-

structing and operating a plant for the generation and transmission of electricity for purposes of light and power. The plant was at Bodie, California, and the Company's high tension wires ran to different points in the State of Nevada. During the early part of the year 1911, it had constructed a line to the town of Wonder. This consisted of three parallel wires strung upon poles, and was called the main line. From this main line a branch line, consisting also of three parallel wires, was constructed to a point near the town of Fairview. A substation was constructed at Wonder in which the high voltage current was transformed by means of transformers to a lower voltage for use as power by mines in that vicinity. Another substation was constructed at Fairview, about sixteen miles from Wonder, for the same purpose.

The defendant in error, hereinafter referred to as "Sheaff") was injured on the 18th day of July, 1911. He had been in the employ of the plaintiff in error (hereinafter called "the Company") since April of the same year. Prior to that time he had been in the employ of a contractor who had done part of the construction work for the Company. During the time Sheaff was employed directly by the Company the work was practically completed and Sheaff and his immediate superior or "boss" intended to leave on the day following the date of the accident.

The substations at Wonder and Fairview were built of corrugated iron and the transformers were

housed therein. A lightning-arrester was also built at each substation. The purpose of the lightning-arrester was to take care of and render innocuous any surges of electricity on the high tension wires that might occur by reason of lightning, electrical storms, or other causes. If extremely heavy surges should occur on the wires there was danger of great injury to the transformers and to the power system generally. But the lightning-arrester operated to divert the supercharge and carry it to the ground, thus preventing its passage into and through the transformers where the greater part of the damage could be done.

The details of construction of the lightning-arresters can best be understood by reference to the model which was introduced in evidence, and which has been transmitted to this court. Suffice it to say here that it was of the horn-gap type—a standard form of lightning-arrester. It had so-called "live" arms, situated on one side of a framework and connected with the high tension wires above, and "dead" arms, situated on the other side and connected with the ground by means of ground wires. One side of the lightning-arrester —that on which the live arms were situated—was extremely dangerous. The other side—where the dead arms were—was safe except in the case of a surge which was heavy enough to cause the current to jump from the live to the dead side, a distance of 4½ inches at the nearest point.

The lightning-arrester was within an enclosure surrounded by a wire fence, the substation building forming one side of the enclosure. A danger sign reading "DANGER—HIGH VOLTAGE—KEEP OUT", was placed upon the south side of a switch pole near the lightning-arrester facing the trail leading up the hill on the top of which the substation was built (fols. 189, 190, 193, op. 337; fol. 379, p. 414; fol. 479, p. 451).

Mr. Halpenny, who was in charge of the construction work, was not satisfied with the ground wires attached to the dead arms of the lightning-arrester. He desired to place concrete blocks under the ends of the dead arms and attach the wires thereto in such manner that any surge, after jumping the gap, would have to pass through the concrete blocks to the ground, thus forming a resistance which would aid in destroying the arc formed by the surge on the wires, and in causing the current to resume its normal flow.

A similar change had been made in the lightning-arrester at Wonder. Sheaff had made the concrete blocks for the Wonder arrester and had assisted in installing them under the directions of Halpenny. This work had been done about a week before the accident and Sheaff was thoroughly familiar with it.

Accordingly, Halpenny sent Sheaff to Fairview on the morning of the accident with instructions to dig holes under the dead arms of the lightning-

arrester and place the concrete blocks therein. He was also to get certain clamps, previously ordered by telephone, which were to be attached to the concrete blocks. He admits that he was given no instructions to touch or interfere with the wiring already there or to do any new wiring.

The clamps, as it happened, were not ready so Sheaff's work was confined to digging the holes under the dead arms. The concrete blocks could not be installed until the clamps had been placed thereon and adjusted. The only thing Sheaff could do, therefore, in carrying out his instructions, was to dig the holes.

On the morning of the accident he obtained the key to the substation and entered it to get a pick and shovel. On the door of the substation was a danger sign. While there Sheaff heard the purring of the transformers which indicated that the current was passing through them and to the mine beyond. He knew and recognized this peculiar sound. Upon obtaining the pick and shovel he went to the rear of the substation where the lightning-arrester was situated, took down the wires on the south side of the enclosure by removing the staples and entered the enclosure. He went directly toward the dead side of the lightning-arrester, which was about four feet from the live side. He dug the three holes, one under each of the dead arms. The last of the three holes took him to the northerly side of the lightning-arrester. After finishing them

he threw down his shovel with the intention of leaving the enclosure by going between the substation building and the live arms of the lightning-arrester, a space of several feet. Between the northerly side of the lightning-arrester and the wire fence there was plenty of room to move about without going near the live arms of the lightning-arrester. These live arms were in plain view, as were also their connections with the high tension wires above. Sheaff could have left the enclosure by the same route he had entered it, in which event he would not have been near the live arms. Instead of doing so he "wandered" toward the substation "without thinking". When, according to his testimony, he was near some part of the northerly live arm he lost consciousness and later found himself lying upon the ground near the northerly arm. Upon the tip of the northerly arm was found a small nub or "teat" indicating that an arc had been formed at that point. Sheaff's shoulders, back and feet were fearfully burned, the current evidently passing through his body to the ground.

It was shown that electricity of the voltage then being carried on the wires would not, under the most favorable conditions, jump more than one and three-quarters inches. There was no evidence to show whether Sheaff actually came into contact with the live arm or whether the electricity jumped to his body. If it did jump he must have been within less than an inch and three-quarters

of the live arm when it did so. The evidence is to the effect that the mark on the tip of the northerly arm could have been caused *either* by contact or by the arc formed when the current jumped the intervening space.

Sheaff makes the claim that the Company was negligent in ordering plaintiff to do the particular work assigned to him under the circumstances then existing. In order to determine this question it will be necessary to relate, in some detail, the previous experience of Sheaff, the circumstances surrounding his employment by the Company, and his experience with the Company prior to the accident.

These circumstances, and Sheaff's experience, *as related by himself,* are as follows:

At the time of the accident he was 26 years of age. He was born in England and came to this country in 1902. After spending some years in Canada he returned to this country in 1907. He had been in Alaska, New Zealand, Australia, and had touched at the South Sea Islands. He was a steam stationary engineer. His education was received in England. He graduated from the Grammar School and was about four months in High School, leaving school at the age of 12 years and four months. At that time he had never received any instruction in electricity (record fols. 2, 3).

When he was seven years of age his parents moved to the City of Canterbury, which had a popu-

lation of about 30,000. He lived there about ten years and left at the age of seventeen (fol. 78). After leaving Canterbury he went to British Columbia, where he obtained work firing a steam boiler (fol. 80). He had probably heard something of the use of electricity before he was seventeen years of age (fol. 81). Street cars were being operated by electricity in Vancouver when he first went there (fol. 82). He was two or three months about a steam engine before being permitted to run it (fol. 83). After running it for some little time he was left in charge of the engine and for a time had actual charge of it (fol. 84). All his experience about a steam engine only occupied something like two months and he was put in charge of it (fol. 85).

His next experience with steam engines was in 1906, at Millers, Nevada. Prior to going to Nevada he went to Australia and New Zealand in steamships and upon returning spent some time in San Francisco and Oakland, where trolley cars were run by electricity (fols. 85-87). Even in 1904 he knew they had electric lights and that they ran street cars and other things by electricity (fol. 88).

When a boy about sixteen or seventeen years of age he first had his attention attracted to the fact that electricity would give one a shock if one happened to get close to it or in contact with it. That was before he left Canterbury. He was at a country fair and you paid a fellow a small fee if you got a shock. He was told it was electricity he was using. He took hold of some handles and made a

connection and received a shock through his system, and from that time on he knew that electricity would do that sort of thing (fol. 90).

He learned his trade as an engineer of steam engines in British Columbia, after which he had more experience at Millers, Nevada, and Sabrina Lake, California. At Millers the plant was called the Tonopah Mining Company's plant. He was employed at the Esmeralda Power Company's plant in 1906, when he came back from New Zealand. In 1906 he was working on a boiler on a steamship running between Victoria, British Columbia, and Skagway, Alaska. That steamship was electrically lighted (fols. 91, 92). He didn't have anything to do with the electric generators or motors on that ship. There was only one of them and he knew the office of it. He knew that the generator was a mechanical appliance by which the electricity used on the ship was generated. He learned the name of it and knew that it was a generator at that time. They had a dynamo. He has learned since that a dynamo and generator are practically the same thing (fol. 93).

When he stated to the jury that his trade was that of a stationary engineer he based that on the experience he had detailed and such additional experience as he received at Esmeralda Power Company (fol. 94). He was first employed there as an oiler for about six weeks or two months; then as a fireman. He worked there during parts of 1906 and 1907 (fols. 94-95).

At first there were three engines in that power plant, and then they put in the fourth, and each one of those engines was connected with the generator, and the office of that generator was to generate electricity to use for power and light. That power plant distributed electricity in Tonopah and Millers. He knew that the juice went over the wires. His duty in or about the generators as an oiler was only to wipe them. There was a switch board in that plant made up of different sections (fols. 97, 98). There were a good many switches on it. The office of the switch was to cut off or turn on the electricity. During the time he was working in that plant as foreman or oiler, or both, he observed that switch being operated (fol. 99). There was a kind of slot where the switch went in and he supposed that where that switch went into the slot the *contact* was made which allowed the current to flow through. That was what he understood at that time (fol. 100).

While he was working in that power plant and around those generators, and oiling them, he didn't know anything of the destructive power of electricity. Possibly he knew then that electricity could kill. He didn't remember whether he had or had not heard of people being killed by strokes of lightning. He supposed he had, though. He knew that in the State of New York criminals were executed by means of electricity. He didn't know whether he knew that then or not, but wouldn't say that he did not. During his lifetime he has kept his eyes pretty well open about things that were going on

about him (fols. 105, 106). He knew that there was such a thing as a cold wire—a dead wire—and he knew that there was such a thing as a live wire. He knew that a live wire was one carrying a current of electricity, and a dead wire was one not carrying a current of electricity (fol. 108). He knew there was electricity going through the lines to Tonopah, and knew it was being generated in large quantities for power and light. He also worked for the Desert Power & Mill Company in 1908, 1909, and part of 1910. It was part of the old Esmeralda Power plant. He worked there as *foreman* in the power house (fols. 109-110). While working there he was brought into connection with electric generators or motors. They had two or three motors that ran pumps there. The motor is an electric business that runs by electricity and has a pulley on it and turns machinery. They had three of those motors at that plant that were operating while he was there. He operated those three motors during that time, about a year and a half altogether. He was pumping water with them. They were operated by throwing a lever. The lever was to stop and start the motors by throwing on or cutting off the electricity (fols. 111-112). He knew that electricity was being used as the power to operate those motors and that the current of electricity was turning those motors or making them work (fol. 112). He was accustomed to go about the motors. He worked the motors and at the same time did work as a fireman. He didn't know whether he touched the wires carrying elec-

tricity into those motors or not during the year he was operating the motors. Supposed he knew enough not to touch them at that time, and that he did know enough to keep away from a live electric wire that was carrying power enough to run a motor (fols. 114, 115). He knew that the electricity used to operate the motors came from some power house at some distance where it was being generated (fol. 116). Up to that time he had worked both in the power house where electricity was being generated and at the other end of the line where it was used in the motor. He had worked at both ends of the line (fol. 117). While running those electric motors he was receiving a salary of $135.00 a month (fol. 117).

There were some steam pumps there too. He ran the steam pumps during the same time off and on for a period of about a year. He ran everything there was to run in the building except the engines for generating steam for the steam pumps (fol. 119).

In the Desert Power & Mill Company he was running the boilers, firing the boilers, running the motors, and running the steam pumps all at the same time. He was in charge of everything in that building and assumed the charge of everything for about a year, at $135.00 a month (fol. 120).

While working at Lake Sabrina they had electric motors. They installed an electric motor when he was there. He tried to operate it across a canyon on a wire but could not make it work. It didn't

give satisfaction. He was assigned the duty of running it at that time (fols. 124-126). At that place he also ran a little steam hoisting engine (fol. 129).

In 1908 they had a little steam engine that ran a generator to operate a motor or crane (fol. 130).

He was employed by the Pacific Power Company about April, 1911. His first work was carrying a lot of crates with insulators in them and painting letters on them (fol. 132). The insulators were like those on the model, only larger. They were to go on the poles to lay the wires on. They were called insulators because they insulated. The object was to insulate the power from the poles to keep the electricity from escaping. He knew they were insulators at that time and that was the object and purpose of them (fols. 133, 134). He had seen the same thing a couple of months before that (fol. 135).

The first work assigned him was to dig some holes. He presumed that his duties were whatever he was told to do (fol. 135). He was running a power line from the main line to the Pacific Power Company substation at Fairview (fol. 139). He ran the telephone wire at the same time. He did not help dig all of the holes; he helped lay the wires and placed the insulators on the poles (fol. 140). He assisted in laying the wire upon the insulators—had been instructed to do that work by Mr. Johnson, who described it and told him how to do it (fol. 140). He had difficulty in carrying out his instructions at first, but learned (fol. 140). He assisted in laying the wire during the whole length of two miles and

was there while the connections were being made with the main power line (fol. 141). He was sure of their being connected up and the power being turned on. The first time the power was turned on was about two months before the accident. That power was to be carried over that line into the substation for use by the Nevada Mining Company. So far as he knew they were running all their mechanical appliances there by electricity which they were receiving from the Pacific Power Company's substation at Fairview—the same substation to which he had built the connecting line (fols. 142, 143). He helped to construct the power line and to place the wires that were carried into the Fairview substation (fol. 145). The process would be for the power to be carried along each of those three wires through the wire running along the top of the model and into the substation. The purpose of the substation was for distributing power. There were three transformers there in that station (fol. 146).

When he finished building the line into the Fairview substation he went to work at the Fairview substation itself assisting Mr. Halpenny in placing the transformers (fol. 147). He knew that electricity was carried into the transformers, and he knew the wires went out over to the other company's substation (fol. 148).

After completing the work of installing the transformers he went to Wonder with Mr. Halpenny. At Wonder the work was about the same nature as in Fairview (fol. 149). The Wonder substation had just

been built. The line was then built from the main power line into the Wonder station. That was the end of the line and the substation was just being completed. That substation was supplying the mine and the mill in Wonder and the electricity that came through the substation did not go to any other substation before being used (fol. 150). At Wonder the first work was moving around and placing the transformers, and then he helped Mr. Halpenny build the lightning-arrester at Wonder (fol. 151). The power must have been turned into that substation at Wonder before the transformers were installed. The power was turned into the Wonder substation pretty soon after he went there (fol. 151). It was turned on to the wires that were carried into the Wonder substation in some fashion similar to the way it was carried into the Fairview station (fol. 152). After assisting in installing the transformers at Wonder he went to Fairview and worked on the lightning-arrester there (fol. 153). After that he was in charge of the construction of a line from the Wonder substation to the mine. This work was done under his direction (fol. 153). He did some work on the lightning-arrester at Fairview and gives a description of the wiring connected therewith (fols. 155-158).

After assisting with the lightning-arrester at Fairview he went to Wonder to help put up a lightning-arrester there (fol. 163). Then he built the line from the Wonder substation to the Wonder Mining Company's mine. He directed putting up

the poles and personally laid the wires on that line from the Wonder substation to the mine. He placed the insulators and attached the wires to the insulators (fol. 163).

The lightning-arrester at Wonder was placed differently from that at Fairview. There were pipes on it. The pipes carried down from the power wire making a turn over an insulator and then breaking off was the same construction at Wonder as at Fairview. They had on the opposite side these dead wires running from nowhere and running down this arm and turned pretty close to the pipe connected with the power wire—that was the only similarity between the two. He thought it had practically, although differently placed, the same sets of wires as the one at Fairview (fol. 165).

Before leaving Fairview he thought those pipes were put there—that they were running from the lightning-arrester up to the insulator, and at any rate up near the power line (fol. 166). He thought the opposite wires, those without connections, had been put up at that time in Fairview, and so far as he knew, the lightning-arrester at Fairview was complete when he left there to go to Wonder (fol. 166).

He was frequently in the substation at Wonder while it was in operation, while the power was passing through it (fol. 170). He assisted with the work down in the Wonder substation, drying out the transformers by electricity (fol. 170). The electri-

city was used for the purpose of creating heat in the transformers (fol. 172). He took a shift by himself on that work (fol. 173). He knew how to turn on and turn off electricity by means of that switch and he knew the purpose of changing the switch (fol. 174). He presumed he kept himself from contact with exposed electric wires during the time he was doing that work (fol. 175).

> "Mr. CANNON. Q. You were careful, in other words, to keep your hands and your person away from those live wires, weren't you?
> A. Well, I don't think there was any necessity of getting near them.
> Q. At any rate, you didn't make any effort to get in contact with any of those live wires, did you?
> A. I don't think so.
> Q. In other words, you knew enough about electricity at that time not to get into contact with a live wire, didn't you?
> A. Yes."

He had been in substations while transformers were working and knew they made some kind of a noise, a kind of hum. Inside the transformer station it is a sound that can be readily detected by any one who has heard it before (fol. 176). The sound is a kind of a purr. Prior to his accident he had heard that purring sound in Fairview that morning when he went in there to get a pick and shovel (fol. 177).

Before going to Fairview on the morning of the accident he did not see Mr. Halpenny. He saw him the night before at Wonder. Halpenny told him to

go over there and get some clamps made and to dig some holes and put these blocks in *and he would be over and finish up the job.* Those clamps had been ordered before he went over (fols. 178, 179).

Mr. Halpenny told him to go over there and get some clamps made and dig these holes under these arms, the arms closest to the switch, he said, and dig the holes and put these blocks in, *and he would be over there to finish up* (fol. 180). Halpenny told him to dig the holes on the side of the lightning-arrester closest to the switch, and the switch would be on the side farthest away from the substation. He told him to dig holes underneath those rods—those pipes—underneath those curved pipes and put those concrete blocks in the holes and the clamps on the concrete blocks. He did not tell him not to touch the wiring in any way, only that he would be over the next morning, or the next day, to finish the work himself. He told him to do nothing more, that he would be over and finish it. Those instructions were the only instructions he was given as to any work he was to do. His work consisted in directions to dig those holes at the place indicated, insert concrete blocks and fasten the clamps to the concrete blocks; as far as Halpenny told him, that was all he was to do. He received no directions to do any other work on that day. Halpenny told him that he would be over to finish up the work (fols. 181-183):

> "Q. The point where the pipes which are not connected with the feed-wires above—the

point where those three pipes were connected to the lightning-arrester, and to the framework near it, was in plain view, was it not, from the lightning-arrester, and from practically all points surrounding the lightning-arrester?

A. Well, they would be, if you looked up to them you could see them'' (fols. 185, 186).

To a person standing anywhere in the neighborhood of the lightning-arrester, there was nothing to prevent him from seeing, if he had looked, how these connections and attachments of all these pipes and wires were made. He did not think there was any obstruction or impediment to his observation (fols. 187, 188).

He assisted in drying out the transformers at the Fairview station, taking his shift there the same as he did at Wonder (fol. 189). Before going and looking at the thermometers in the transformers he turned off the current *so he would not get burnt* (fol. 193). In going to the tank he came in close proximity to some of the live wires and knew then that the power was actually being used in the substation in some manner (fol. 195).

Sheaff worked for the Pacific Power Company as a laborer, electrician's helper and lineman at different times. As a laborer and electrician's helper he received four dollars per day, and while working as lineman received the ordinary pay of a lineman, namely, $4.50 per day. His cancelled

checks show the character of his employment at different times (fols. 200, 218).

Sheaff did not think he would have put his hands deliberately upon a wire carrying a load of electricity (fol. 222). As to Sheaff's knowledge of electricity passing through transformers and the purr connected therewith, see folios 223-225.

At Wonder he painted a danger sign for the Wonder substation (fol. 230). He nailed that danger sign on the switch post at the substation (fol. 231). He didn't see any danger sign at the Fairview substation (fol. 232). He did not look for any (fol. 234).

As to Sheaff's version of the accident itself see folios 246-276.

Particular attention is called to folios 215 et seq., where Sheaff, referring to the work he was ordered to do on the day of the accident, said:

> "I don't know how I happened to dig it underneath the point of the arm. Possibly he had told me to dig it under the point. As near as I can tell you he told me to dig those holes under the arms nearest the switch. I don't remember of his telling me to dig them under the point. I happened to dig them under the point because I presume that is where he wanted them. I guess it was because I knew of my own knowledge and experience where they ought to be dug. I had done that same work on the Wonder lightning-arrester and I had dug those holes on the Wonder lightning-arrester, and had assisted in placing the concrete blacks at the Wonder arrester. I guess that was how I came to know how to do that

kind of work. I had done that work at the Wonder substation under the direction and under the instructions of Mr. Halpenny, with Mr. Halpenny right there telling me how to do it. When I had finished that work at the Wonder substation I knew how to do that thing, and when I was instructed by Mr. Halpenny to go over there and do that work I knew how to do the work I was assigned to do. I knew where to place the holes."

Particular attention is also called to the following testimony given by Sheaff, as to facts transpiring immediately before the accident. He said (fols. 274 et seq.):

"Before starting for the point where I threw away the shovel, toward the building, I don't remember listening to hear the purr of the transformers. I did not look at the arm or arms nearest the building. I did not follow those arms, those pipes or arms, up to their connection with the power line above. I don't remember doing anything of that kind. My intention was to go around to the other side of the building. I don't remember listening for anything for the purpose of finding out whether there was power there or not. I threw my shovel away and went toward that building, *without thinking of the danger, or without thinking of any possibility of danger.*"

"Mr. Cannon. Q. It is a fact then, isn't it, that you wandered over to that point without any thought on that subject at all? A. Yes."

Other testimony of Sheaff, showing his familiarity with electricity appears at folios 277-284. He also had experience in blasting with dynamite (fol. 283).

Lee Campbell, a witness for plaintiff, testified that he met Sheaff on the 14th of January, 1911; that he worked in the same construction crew with him constructing the line to Wonder; that subsequently he worked with him a few days at Fairview. In the construction of the line to Wonder he started digging holes and they were short a man in the wiring gang and witness requested the foreman to put Sheaff at that work (fols. 21, 22, page 271). Sheaff continued digging post holes just a few days. There were three separate gangs, one gang digging holes, one gang setting poles, and the wire gang. Sheaff, after being at work a few days digging post holes, was taken from that work and put into the wire gang (fol. 24, page 272).

There is a great deal more testimony as to Sheaff's experience. Mr. Halpenny testifies in great detail to a great deal of wiring work done by Sheaff, and to Sheaff's handling of live wires at different times. Mr. Greenleaf also testifies to Sheaff's working among the wires in the substation at Wonder while the transformers were being dried out. Some of the statements made by Mr. Halpenny, however, were denied by Sheaff, and we have therefore not inserted them in detail here, because our purpose is to present this case upon the uncontradicted testimony of Sheaff and his own witnesses. Sheaff's experience, as it has been hereinabove set forth, is gathered entirely from his own testimony with the exception of the work done by him in January and

February, 1911. His work at that time is detailed by the witness Campbell.

As will be shown hereafter, the complaint alleges that he was employed as a "laborer and electrician's helper". There is no evidence that when he was employed by the Pacific Power Company, or at any other time, he stated or in any manner intimated that he was not familiar with all of the duties of an electrician's helper. During the time he worked for the Pacific Power Company he showed himself to be in every way competent, and Mr. Halpenny, who gave him his orders, considered him a very competent man and very much above the average in intelligence and capacity. There is no evidence that Mr. Halpenny, or any employee of the company, ever knew or had any reason to believe that he was unfamiliar with the duties of an electrician's helper. On the contrary, he did the work of an electrician's helper satisfactorily to his employer and received pay as an electrician's helper. He also did satisfactory work as a lineman and received a lineman's pay therefor.

Therefore, on the day of the accident he must be treated, under the pleadings and evidence, as a thoroughly competent electrician's helper. As such Mr. Halpenny had the absolute right to assign him to the duty of digging the holes under the dead arms of the lightning-arrester, a perfectly simple and safe task. Mr. Halpenny had no cause or reason to believe that after digging the holes Sheaff would wander from a safe place into an extremely

dangerous place where his duties did not call him and thereby receive injuries.

The evidence does not show any duty on the part of the employer to warn or instruct Sheaff, and shows no knowledge on the part of the employer that Sheaff was ignorant of the dangers of his employment or required any warning or instruction. On the other hand, Sheaff's own testimony is to the effect that he was thoroughly familiar with the work assigned to him and knew how to do it because he had done the same character of work shortly before under the instructions of Mr. Halpenny.

Specifications of Error.

The plaintiff in error relies upon and will urge as grounds for the reversal of the judgment of the District Court the following specifications of error, to wit:

I.

The District Court erred in denying the motion of plaintiff in error, made at the close of the case of defendant in error, for a peremptory instruction to the jury requiring and directing the jury to return a verdict for the defendant, said motion being made on the following grounds:

1. That the complaint fails to state a cause of action.

2. That the evidence fails to prove the material allegations of the complaint.

3. That the evidence fails to show that the lightning-arrester described in the complaint and in the evidence, was defective in the particulars alleged in the complaint, or any of them, or in any particular whatsoever, or defectively built or constructed, or maintained, or that plaintiff was injured by or through any such defect.

4. That the evidence fails to show that the defendant put the plaintiff at dangerous work, or that plaintiff was inexperienced in the work at which he was placed, or ignorant of the dangers thereof, or that defendant knew, or ought to have known, of plaintiff's ignorance, or inexperience, or that plaintiff was placed at any such work, without any or sufficient warning or instruction, or that plaintiff was injured by or through any of such matters and things.

5. The evidence fails to show that plaintiff's injuries were proximately caused by or through any defect or defects in the lightning-arrester, or in the construction or maintenance thereof.

6. The evidence fails to show that the plaintiff's injuries were proximately caused by any act or omission of the defendant in setting plaintiff at work, or directing the work at the time and place complained of, or in failing to warn him as to the dangers thereof, or in failing to instruct him as to his duties, or how to avoid the dangers thereof.

7. The evidence fails to show that plaintiff's injuries were proximately caused by the negligence alleged in the complaint, if any.

8. The evidence shows that the plaintiff's injuries were proximately caused by a separate, independent, intervening cause, for which plaintiff was alone responsible.

9. The evidence shows that the danger to which the plaintiff was exposed was incident to his employment, and that he assumed the risk of the same, and the responsibility thereof.

10. The evidence shows that the danger to which plaintiff was exposed was an open and obvious one; that he is presumed to have known and appreciated the same, and that he therefore assumed the risk thereof.

11. The evidence shows that the danger to which plaintiff was exposed was one which should have been observed and avoided by a person of plaintiff's experience, knowledge, intelligence and capacity, and that plaintiff therefore assumed the risk thereof.

12. That plaintiff was an experienced workman,, and that the dangers to which he was exposed in and about the place he was set at work, were such only as were incidental to his employment, and should have been observed and avoided by him, and that he assumed the risk thereof.

13. That the plaintiff did know and appreciate the dangers to which he was exposed, and that he therefore assumed the risk thereof.

14. That the plaintiff assumed the risk of the dangers to which he was exposed in this, to wit:

That upon completing his work of digging the holes in question, he voluntarily chose an unsafe, insecure and highly dangerous way to leave his place of work, and the enclosure surrounding the same, which way was known, or ought to have been known to him, to be dangerous, instead of a perfectly safe way, of which he fully knew.

15. That the evidence fails to show whether the plaintiff's injuries were caused by plaintiff's coming into actual contact with a live wire of the defendant, or by the electricity jumping from such live wire to plaintiff's body, while his body, or any part thereof, was within one and three-quarters or one and seven-eighths inches from such wire, or while plaintiff's body was within four and one-quarter or four and one-half inches from such live wire, or by coming into contact with or near the dead side of the lightning-arrester while it was carrying on overload or surge from any cause, or whether there was any overload or surge, or what was the cause of such overload or surge, if any, and that, therefore, negligence of the defendant is not proved, but is merely speculative, and the causal connection between the negligence alleged, if any, and the injury, is not proved but is merely speculative.

16. That the plaintiff's injuries were proximately caused by his own contributory negligence.

17. That the plaintiff's injuries were proximately contributed to by his own negligence.

18. That the plaintiff's injuries were proximately caused or contributed to by his failure to exercise ordinary care to avoid injury to himself, by his failing to heed the warning of danger given by the fence around the lightning-arrester, and by the danger signs upon the substation door and the switch-pole, both of which were, or could have been observed by him, by the exercise of ordinary care upon his part, and by his failure to use ordinary care to keep away from the live wires in the lightning-arrester, when he knew, or ought, in the exercise of reasonable care, to have known, by the purring of the transformers, and other facts and circumstances then known to him, that said wires were alive, and carrying a high voltage; and by his voluntary action in coming into close proximity, or in contact with said live wire, when he could have departed from said enclosure by another, and perfectly safe route then known to him, and by his failure in other respects to exercise the care imposed on him by law in view of his age, experience, intelligence, capacity and powers of observation.

19. That the accident to the plaintiff could not have been reasonably foreseen or anticipated by the defendant. (Record fols. 311 to 321, pages 384 to 388; Assignment of Error No. XXVIII, fols. 57 to 68, pages 62 to 66.)

II.

The District Court erred in denying the motion of plaintiff in error, made at the close of the entire

testimony, for a peremptory instruction to the jury requiring the jury to return a verdict in favor of the defendant, said motion being made on each and all of the grounds set forth in the motion for a peremptory instruction made at the close of the case of defendant in error. (Record fols. 745 to 747, pages 552, 553; Assignment of Error No. L, fols. 94 to 97, pages 77, 78.)

III.

The District Court erred in refusing to give to the jury as requested, and in modifying the following instruction (being numbered 3 of the instructions requested by plaintiff in error):

> "You are instructed that the only cause of action, which the plaintiff is entitled to have submitted to you for consideration, is based upon the charge that the defendant sent the plaintiff to work at a place which was not reasonably safe in view of the unusual or extraordinary risks incident thereto, if any there were. You are, therefore, further instructed that if you find from the evidence that the place to which plaintiff was sent to work was a reasonably safe place, as that expression or term is hereinafter defined, your verdict must be in favor of the defendant, Pacific Power Company." (Assignment of Error No. LI, fols. 97, 98, page 79; record fols. 808, 809, pages 576, 577.)

IV.

The District Court erred in refusing to instruct the jury as requested by plaintiff in error in its certain requested instruction numbered 4A, reading as follows:

"The complaint does not allege that the plaintiff was unfamiliar with or ignorant of the ordinary duties of an electrician's helper, and does not allege that the plaintiff was ignorant of the ordinary risks and dangers of his employment as an electrician's helper. You are, therefore, instructed that it must be taken as an admitted fact in this case, so far as the charges of negligence against the defendant are concerned, that the plaintiff was familiar with the ordinary duties of an electrician's helper and comprehended all of the usual and ordinary risks and dangers attending the said employment." (Assignment of Error No. LII, fols. 99-101, pages 79, 80; record fols. 810, 811, pages 577, 578.)

V.

The District Court erred in refusing to give requested instruction of plaintiff in error No. 4 B, reading as follows:

"The complaint does not allege that the plaintiff was unacquainted with or ignorant of all of the dangers incident to the work of a journeyman lineman and electrician, but does state that the plaintiff was unacquainted with and ignorant of the dangers incident to the work of a journeyman lineman and electrician upon and near wires or apparatus carrying electric current of high voltage and potential energy. You are instructed, therefore, that in so far as the charges of negligence against the defendant are concerned, it must be taken as an admitted fact in the case that the plaintiff was acquainted with and not ignorant of any of the dangers incident to the work of a journeyman lineman and electrician, excepting upon near wires or apparatus carrying electric current of high voltage and potential energy. As to all other matters relating to such duties and dangers he

must be deemed, in so far as negligence against the defendant is concerned, to have had knowledge of such dangers." (Assignment of Error No. 53, fols. 102-104, pages 80, 81; record fols. 812, 813, page 578.)

VI.

The District Court erred in refusing to give to the jury requested instruction of plaintiff in error No. 4 C, reading as follows:

"The complaint, as amended, charges as one of the alleged defects of the lightning-arrester that it was placed or constructed too close to the substation building. You are instructed that the evidence fails to sustain this charge, and you will, therefore, ignore it in arriving at your verdict." (Assignment of Error No. 54, fol. 105, page 81; record fol. 814, page 579.)

VII.

The District Court erred in refusing to instruct the jury as requested by plaintiff in error in its proposed instruction No. 5, reading as follows:

"Certain evidence has been admitted in this case with respect to the question as to whether or not the defendant warned the plaintiff as to the dangers attending the work, upon which he was engaged at the time of the accident, if any, and whether the defendant instructed him as to how to avoid such danger. In this connection you are instructed that the complaint does not set forth any cause of action against the defendant based upon any alleged failure of the defendant to give the plaintiff any such warning or instruction, and you cannot, therefore, find the defendant guilty of negligence on that ground." (Assignment of Error No. 55, fol. 106, page 82; record fol. 815, page 579.)

VIII.

The District Court erred in refusing to give, and in modifying instruction No. 5 B proposed by plaintiff in error, reading as follows:

> "Although the place to which an employee is sent to work may be actually dangerous, it may, notwithstanding, be a reasonably safe place to work within the meaning of the law relating to the duty of an employer toward his employees. Some occupations are essentially dangerous, and some places where employees are obliged to work are essentially dangerous, but it does not follow that an employer is negligent in sending an employee to work in such dangerous place. Dangerous work, such as working about electricity, is lawful and must be done. Therefore, an employer has a right to set an employee at such work or to direct him to work in a dangerous place, and an adult employee, who accepts such work, takes upon himself the risk of the ordinary dangers incident thereto. The greater the risk and danger of the particular work or the particular place, the greater is the risk which the employee assumes. It is only concealed and latent dangers, or dangers of which he does not or should not know and appreciate the risk, for which the employee does not assume the responsibility. Therefore, if an employee is sent to work in a dangerous place, but the dangers, even though great, are open, plain and obvious and such as are or should be known to an adult person of ordinary intelligence and capacity, such place is under the law a reasonably safe place to work, and the employer is not responsible for any injury that may be sustained by the employee through or by reason of such dangers."

The court gave, in substance, the greater part of the foregoing instruction but refused to give the part thereof reading as follows:

> "If an employee is sent to work in a dangerous place, but the dangers, even though great, are open, plain and obvious and such as are or should be known to an adult person of ordinary intelligence and capacity, such place is under the law a reasonably safe place to work."

With respect to this part of the instruction the District Court, in the presence of the jury, said:

> "I cannot, as a matter of law, instruct the jury that a dangerous place, no matter how dangerous it is and how unnecessarily dangerous it is, is a safe place to work, if the servant knows and appreciates the danger." (Assignment of Error No. 56, fol. 108, pages 82, 83, 84; record fol. 818, pages 580 to 584.)

IX.

The District Court erred in refusing to give instruction No. 5 C requested by plaintiff in error, reading as follows:

> "If you find that the defendant sent the plaintiff to work in a place which was actually dangerous, but the danger thereof was open and appreciated by him, I instruct you that the place to which he was sent was reasonably safe, and his employer cannot be held responsible for injuries suffered by him through or on account of such dangers." (Assignment of Error No. 57, fol. 112, page 84; record fol. 826, page 584.)

X.

The District Court erred in refusing to give to the jury instruction No. 15 requested by plaintiff in error, reading as follows:

> "You are instructed that the danger attending the employment of the plaintiff at the time of his injury was open, patent and obvious and such as should have been known and appreciated by an adult person of ordinary intelligence, experience and capacity. This being so he assumed all the risks thereof, and your verdict must, therefore, be in favor of the defendant." (Assignment of Error No. 58, fol. 114, page 85; record fol. 827, page 584.)

Argument.

I and II.

THE DISTRICT COURT ERRED IN REFUSING TO DIRECT A VERDICT IN FAVOR OF PLAINTIFF IN ERROR. (Assignments of Error Nos. XXVIII and L.)

This assignment of error is divided into two general propositions, viz.:

A. That the complaint fails to state a cause of action; and

B. That the evidence fails to prove the material allegations of the complaint.

These will be considered in their order.

A.

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION.

There are two vital objections to the complaint, first, that no actionable negligence is alleged, and

second, that no causal connection is shown between the negligence attempted to be alleged and the injury.

It is alleged, in substance, that the plaintiff in error, a company furnishing electric current for light and power, had constructed, and on the 18th day of July, 1911, the date of the accident, maintained a lightning-arrester in a defective and dangerous condition, in this , that the wires, rods, arms and appliances carrying "electrical currents and energy of high and dangerous amount and voltage were not erected, built and maintained *at a safe and sufficient height and distance from the ground* but was built and maintained *too near the ground* and in *too close proximity* to the Nevada Hills station-house or transformer station;" that on said day "plaintiff herein was in the employ of the defendant as a *laborer and electrician's helper* and was unfamiliar with the work of a *journeyman lineman and electrician* and was unacquainted with and ignorant of the dangers incident to the work of a *journeyman lineman and electrician upon or near wires or apparatus* carrying electrical current of high voltage and potential energy and plaintiff was receiving from defendant only the wages of a laborer or *helper;*" that on said date, "plaintiff was ordered to work *in and around and near* said lightning-arrester and said Nevada Hills transformer house and substation; that said place was a dangerous place in which to work by reason of the defects alleged herein and *by reason of the fact that*

the live arms of said lightning-arrester were so near the ground and in so close proximity to said sub-station building; that said dangers and dangerous condition were wholly unknown to plaintiff herein and plaintiff was ignorant of the same;" that plaintiff on said date, "while working *near and around* said lightning-arrester as ordered by defendant came *either in such close proximity to or in contact with one of the said arms of said lightning-arrester;* whereupon a large amount of electrical current, to wit, sixty thousand (60,000) volts, passed through the body of plaintiff to the ground, thereby inflicting upon plaintiff a violent electrical shock and severe and dangerous injuries;" that "by reason of said negligent and defective construction of said lightning-arrester and by reason of its construction and maintenance at an unsafe and insufficient distance from the ground and by reason of its nearness to said transformer-house and by reason of the dangerous place in which plaintiff was ordered to work and of receiving said shock and charge of electricity, plaintiff sustained a number of grievous injuries" etc.; that "by reason of the infliction of said physical injuries on plaintiff and by reason of the negligence, carelessness and wilful indifference of defendant as aforesaid, plaintiff has been damaged," etc.

1. It will be observed that this complaint does not allege *inexperience* on the part of defendant in error. On the contrary, it alleges that he was employed as a laborer and *electrician's helper.* It

does not state that he was unfamiliar with the duties of a laborer or electrician's helper. The allegation is that he was unfamiliar with the work of a "journeyman lineman and electrician". Therefore it must be assumed (the complaint having been demurred to) that defendant in error was an experienced "laborer and electrician's helper".

2. It will next be observed that the complaint does allege that defendant in error was "unacquainted with and ignorant of the dangers incident to the work of a journeyman lineman and electrician" (not "electrician's helper"), and that said dangers and dangerous condition were wholly unknown to the plaintiff herein and plaintiff was ignorant of the same". In view of the fact that defendant in error was an *experienced* employee he must be assumed to know and appreciate the ordinary dangers incident to his employment. His ignorance of such dangers cannot assist his cause of action, at least until such ignorance is brought home to his employer. Neither can his ignorance of the dangers of *another and different* employment, viz., "journeyman lineman and electrician," help his case. Under such circumstances an employer is entitled to rely upon his employee's experience so far as the ordinary dangers incident to his employment are concerned, and also as to dangers which are open and obvious to any intelligent man.

3. It will be noticed also that the complaint fails to show that the employer *knew* of plaintiff's ignorance or inexperience (assuming him to be inexpe-

rienced). In actions of this character such an allegation is absolutely essential as will be shown by the authorities hereinafter cited.

4. There is no allegation that the employee was set to work without instruction or warning of the danger of his employment. This is also a necessary averment.

5. No *facts* are alleged showing a causal connection between the alleged negligence and the injury.

6. The complaint fails to show whether the accident happened because defendant in error came in "close proximity to" or "in contact with" one of the arms of the lightning-arrester. The allegation in this respect is in the disjunctive. Therefore the complaint does not show how the accident happened.

1, 2, 3 and 4. These matters all relate to the question as to whether actionable negligence is alleged or not. They will, therefore, be discussed together

The substantive allegation of the complaint is that the plaintiff was ordered to work "in and around and near" the lightning-arrester, and that this was "a dangerous place in which to work"; and that "while working *near and around* said lightning-arrester as ordered" the accident happened.

Of course working near and around live electric wires carrying electricity of high voltage is dangerous work. But such work must be done and men must do it. When an employer places a minor at

such work a different rule applies that when the employee is an adult; and when the employer places an inexperienced adult at such work a different rule applies than when the employee is experienced. In the case of an experienced employee there is no duty imposed upon the employer to give the employee instruction or warning as to the dangers of his employment. Even in the case of minors or inexperienced adults the employer is not bound to give warning or instruction unless he knows of the employee's minority or inexperience. If the employer knows of his employee's minority he may, in some cases, be charged with the duty of inquiring as to his experience. These are well known principles applicable to this subject, as the authorities hereinafter cited will demonstrate.

In this case the employee was an *experienced* man. He therefore must be assumed to have knowledge of the danger of working "near and around" live electric wires. If, although experienced, he is *actually ignorant* it cannot be assumed that the employer had knowledge of such ignorance, and no employer can be charged with knowledge of the ignorance of an experienced man. The case made by the complaint is one, therefore, where the employer, in the ordinary course, set an experienced man at dangerous work within the line of his duty. There is no allegation as to whether the employee was instructed as to how to avoid injury or warned of the danger of his employment. There was no obligation resting upon the employer to give such

warning or instruction. No case can be found holding that an employer, when setting an experienced man at dangerous work, is bound to warn him of the danger and instruct him how to avoid it. The duty of warning and instruction rests upon employers only in the case of minors and inexperienced adults. (Moreover, as the complaint is silent on the subject we are entitled to assume that the employee was actually warned and instructed.)

If we are correct in this statement of the law this complaint is clearly insufficient. It alleges, in substance, that an *electrician's helper* was ordered to work *near and around* electric wires. That would ordinarily be the place where an electrician's helper would work, and the first thing such an employee should learn is the danger of coming into contact with electric wires. What duty, therefore, does the complaint show devolved upon the employer with reference to that particular employee? It is submitted that it shows no duty other than to provide for *all* his employees a reasonably safe place to work.

What, under such circumstances, is a reasonably safe place to work? Working around live electric wires is always dangerous. Manifestly, therefore, no obligation rests upon an employer to furnish his experienced employee, whose duty it is to work near and around live electric wires, with a place to work which is *absolutely* safe. Such a thing is impossible. The most that an employer can do

under such circumstances is to use *ordinary care* in that regard. If through want of ordinary care an employer leaves some latent or hidden danger which would be likely to be overlooked by an experienced employee exercising ordinary care, the employer would have failed in his duty. On the other hand, where the danger is an open, obvious and patent one, observable alike by experienced and inexperienced men, no duty rests on the employer. Under such circumstances the burden rests upon the employee to avoid all such dangers.

There is no allegation in the complaint that the wires in question were hidden, or that the danger of coming in contact with them was not open, obvious and apparent to any person of ordinary capacity. It is not alleged that the danger was latent or undiscoverable by the exercise of ordinary care. From all that appears in the complaint the live wire was in plain sight of an experienced employee, and being so he voluntarily came in close proximity to or in contact with it and was injured.

How he happened to come into close proximity to or in contact with the wire is not shown by the complaint. Neither is it shown that any act on the part of the employer was responsible for his doing so. It is only alleged that "while working near and around said lightning-arrester as ordered by defendant" *he came* "either in such close proximity to or in contact with one of said arms of said lightning-arrester" that he received a charge of electric-

ity and was injured. How was it that "he came"? Where, in these allegations, is there any statement of a *duty violated* on the part of the employer? As already stated, in such cases it is necessary to aver (1) that the place must be dangerous, (2) the employee must be inexperienced and ignorant of the danger, (3) the employer must know of plaintiff's ignorance and inexperience, and (4) the employee must be set at work without instruction or warning of the danger. If the complaint is insufficient with respect to any of these matters, it is obnoxious to a general demurrer.

Whitten v. Nevada Power & Light Co., 132 Fed. 782. (Circuit Court, D. Nevada, September 24, 1904.)

In this action for wrongful death, the complaint alleged that defendant, an electric company, was engaged in supplying electricity for lighting purposes; that it engaged so to supply electricity to a named patron; that it was defendant's duty to maintain a safe plant, machinery, poles, wires, lamps and other appliances for the distribution of electricity to said premises, to inspect the same from time to time, and at all times to keep the same in good repair and in safe condition; that it "negligently failed to discharge its said duties", so that when plaintiff's intestate, a workman employed in said residence, without negligence took into his hands an incandescent lamp for the purpose of inspecting his work, he received into his body a severe and

deadly charge of electricity whereby he was instantly killed "through the wrongful act, neglect and default of defendant as aforesaid". In sustaining a demurrer to the complaint District Judge Hawley held that the complaint was too general in its averment of defendant's duty and its breach, saying:

> "It will be observed that the portion of the fifth paragraph of the complaint, which relates to the duty of the defendant in the several particulars therein named, does not contain any evidentiary or ultimate fact. Such averments are generally held to be wholly insufficient unless connected with a statement of the facts from which the law raises the duty. This general principle is too well settled to require extended discussion. 14 Ency. Pl. & Pr. 332, and authorities there cited. * * * The most objectionable part of the complaint, viz., the 'lumping clause', setting out all the duties of the defendant without specifying any breach of duty, may be considered as mere surplusage, which would not call upon the defendant to specifically answer."

O'Connor v. Atchison, T. & S. F. Ry. Co., 137 Fed. 53, 504, 505.

This was an action for the death of a railroad section hand while unloading a dump car. The complaint alleged that the service in which deceased was killed was without the service he had contracted to render, and that he was ignorant of its dangers, but failed to allege that defendant or its roadmaster knew or should have known that deceased was inexperienced or of immature judg-

ment, or ignorant of the attendant dangers. The Circuit Court for the Northern District of Illinois sustained a general demurrer to the complaint whereupon the plaintiff, electing to stand upon the complaint, judgment was entered dismissing the suit. On appeal the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment, the court saying:

> "The declaration in each count, while averring that the service in which the deceased came to his death was without the service he had contracted to render, and while asserting that he was ignorant of the attendant danger of the service he was ordered to perform, and that the roadmaster knew of the danger but failed to advise the deceased thereof, nowhere asserts that the defendant in error or its roadmaster knew, or had reason to believe, or by the exercise of reasonable care and observation could have known, that the deceased was inexperienced or of immature judgment, or of tender years, or ignorant of the attendant danger of the service to which he was ordered. In dealing with the facts pleaded, we are compelled to assume that the deceased was a man of mature judgment, of ordinary intelligence, and acquainted with the workings of the laws of nature which are of common observation. Assuming, then, that the roadmaster was a vice principal; that the deceased was temporarily withdrawn from the service he had engaged to perform; that he was directed to enter upon another and more dangerous service, with the perils of which he was unacquainted (if we are permitted to assume that he was ignorant of the law of gravity)—the question arises whether the declaration is sufficient without an allegation that the railway company or its road-

master knew or had reasonable cause to believe that the deceased was ignorant of the dangers attendant upon the service to which he was ordered. This question is not a new one in this court. In Reed v. Stockmeyer, 74 Fed. 186, 20 C. C. A. 381, we held that the liability of a master in case of injury to his servant received in an employment, outside of that for which he had engaged arises, not from the direction of the master to the servant to depart from the one service and engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger. This principle is sustained by abundant authority. In addition to the cases considered in our decision, we need only refer to the cases of Klochinski v. Shores Lumber Company, 93 Wis. 417, 67 N. W. 934; Murphy v. Rockwell Engineering Company (N. J. Sup.) 57 Atl. 444; Felton v. Girardy, 104 Fed. 127, 43 C. C. A. 439; Deisenriter v. Kraus-Merkel Malting Company, 97 Wis. 279, 289, 72 N. W. 735; Sladky v. Marinette Lumber Company, 107 Wis. 250, 260, 83 N. W. 514; Wagner v. The Plano Manufacturing Company, 110 Wis. 48, 85 N. W. 643."

Reed v. Stockmeyer, 74 Fed. 186, 187, 188, 189, 190.

In this case it appeared that the plaintiff was employed in defendant's quarry as a scabbler, or preparer of the stone for hewing. He was acquainted with the operations of channeling stone and knew of the existence in the rock of seams which rendered the cuts of stone liable to break in the operation of channeling. Defendant's foreman directed

plaintiff to leave his work of scabbling, which was without risk, and assist in breaking out a cut of stone by the use of wedges. While plaintiff was below the cut of stone clearing the way for the use of a steam drill, a piece of stone split off and fell upon and injured plaintiff. It was held that there was no breach by defendant of any positive duty owing to the plaintiff which produced or contributed to his injury. In a very learned opinion the court said:

> "It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suitable for the use of the servant, such as with reasonable care upon the part of the servant can be used without danger except such as is incident to the business in which such instrumentalities are employed. So, also, is it the duty of the master to provide a reasonably safe place in which the servant may perform his work, and to keep it in such suitable condition. The duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. *There are employments that of themselves are necessarily dangerous, in connection with which no position can be made secure.* In such case the law requires of the master that he shall use ordinary care that the dangers of the employment are not unnecessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant, exercising proper care, may render his service without exposure to dangers that are not within the obvious scope of the employment as usually

carried on. Coombs v. Cordage Co., 102 Mass. 572; Burke v. Anderson, 34 U. S. App. 132, 16 C. C. A. 442, and 69 Fed. 814. The master may, however, conduct his business in the way that seems to him best, although other ways may be less hazardous. In such case, if the servant knows the danger attendant upon such manner of prosecuting the work, he assumes the risk of the more hazardous method. Tuttle v. Railway Co., 122 U. S. 189, 7 Sup. Ct. 1166; Southern Pac. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530; Naylor v. Railway Co., 53 Wis. 661, 11 N. W. 24; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 337; Sweet v. Coal Co., 78 Wis. 127, 47 N. W. 182; Casey v. Railway Co., 90 Wis. 113, 62 N. W. 624; Sullivan v. Manufacturing Co., 113 Mass. 396; Gilbert v. Guild, 144 Mass. 601, 12 N. E. 368; Crowley v. Pacific Mills, 148 Mass. 228, 19 N. E. 344; Coullard v. Tecumseh Mills, 151 Mass. 85, 23 N. E. 731; Railroad Co. v. Lyons, 119 Pa. St. 324; 13 Atl. 205; Anderson v. Lumber Co., 47 Minn. 128, 49 N. W. 664; Michael v. Stanley, 75 Md. 464, 23 Atl. 1094; Rietman v. Stolte, 120 Ind. 314, 22 N. E. 304. The servant, on his part, assumes the natural and ordinary risks attendant upon his employment. *He does not, however, assume unusual and extraordinary risks of which the master knew or should have known or foreseen, unless such risks are obvious, or the servant has actual or presumed knowledge of the danger. It is the duty of the servant to use ordinary care to ascertain the dangers attending the service in which he engages, and to protect himself against known dangers, and such as can by ordinary care be ascertained. This duty is as imperative upon him as is the duty laid upon the master.* Wormell v. Railroad Co., 79 Me. 397, 10 Atl. 49. When the servant is required by the master

to perform temporary service beyond and without the scope of that which he has engaged to do, a question of somewhat different nature is presented. The master may not lawfully expose his servant to greater risks than those pertaining to the particular service for which he has engaged, and against which the servant, through want of skill, or by reason of tender age or physical inability, could not presumably defend himself, if unapprised of the danger. He is bound to warn the servant of the danger if it be not obvious, and to instruct him how it may be avoided. If, however, the servant be of mature years, and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such case the master is not liable for injury happening to the servant in the performance of dangerous work without the scope of his engagement for service, merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and without objection undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment. Cole v. Railway Co., 71 Wis. 114, 37 N. W. 84; Paule v. Mining Co., 80 Wis. 350, 50 N. W. 189; Dougherty v. Steel Co., 88 Wis. 343, 60 N. W. 274; Buzzell v. Manufacturing Co., 48 Me. 113, 121 *The liability upon the master in cases of injury to the servant received in a dangerous employment outside of that for which he had engaged arises, therefore, not from the direction of the master to the servant to depart from the one service and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger"*

Tennessee Coal etc. Co. v. Williamson, 51 So. 144, 145.

This was an action by a servant to recover damages for personal injuries sustained by him. The complaint contained the following allegations: "The said Lewis Meyers ordered plaintiff to chain certain cobbles to a crane, and failed to warn plaintiff of the danger caused by the emission of sparks from the said hot steel rail, which was being sawed, as aforesaid, and as a proximate consequence thereof plaintiff was injured as aforesaid." A demurrer was interposed to this count, and overruled. On appeal the court reversed the judgment because the complaint did not state facts sufficient to constitute a cause of action, saying:

> "It is earnestly insisted that this count is bad: (1) In that it fails to show a duty on the part of Myers to warn plaintiff; and (2) in that it fails to allege plaintiff's ignorance of the danger, or to show a duty to warn plaintiff. The negligence complained of consisted in this: That 'Myers ordered plaintiff', etc. The count fails to show any duty on the part of Myers to warn plaintiff, *in that it fails to aver that Myers knew* of the danger, or *that plaintiff was inexperienced or was in need of any warning, and was therefore subject to the demurrer interposed.*"

Louisville etc. Co., v. Wilson, 50 So. 188, 189.

In this action plaintiff, a minor employee of the defendant, was injured while operating a bolt-cutting machine in defendant's shops. The negligence attempted to be alleged was that defendant

"negligently failed to properly and sufficiently warn or instruct plaintiff of the danger to him in or about working at or with said machine." Objection was taken to this count by demurrer in that it failed to aver that defendant knew of plaintiff's youth and inexperience. The trial court overruled the demurrer and in reversing a judgment for the plaintiff because of this error the court, after an elaborate review of the authorities, State and Federal, said:

> "In Labatt on Master and Servant it is said: 'In cases where there is specific evidence tending to show that the master having knowledge of the servant's inexperience employed him in hazardous work which required the exercise of peculiar skill, the failure to give adequate instructions may properly be found to be negligence. On the other hand, unless the defendant knew, or ought to have known, of some occasion for instruction, his omission to give it cannot be regarded as the proximate cause of an injury which the plaintiff received owing to the want of such instructions. The mere fact that he was injured because he was inexperienced and ignorant of the danger and hazard will not suffice to charge the defendant. The question whether the master at the time of engaging the servant or afterwards ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury,' 1 Labatt, 547, 548. The concluding sentence of the above excerpt from Labatt is quoted by appellee's counsel, who thereupon argue as follows: 'If it is a question for the jury to determine whether the

master ought to have known of the necessity of instructions, then it necessarily follows that plaintiff, especially a minor plaintiff, is not required to aver that the defendant did in fact know; for, if there was necessity to aver knowledge, then, plaintiff would have to prove it.' Of course, he would have to prove it. It is that (the knowledge of the servant's inexperience) upon which Labatt plants the duty to impart instruction; and certainly, without the existence of the duty, negligence is not predicable. As we apprehend the meaning of the sentence quoted and relied upon by appellee's counsel, it has naught to do with averment proper or necessary to show the duty of the master, but rather seems to be an effort to hold clear the distinction between the province of the court and that of the jury in respect to the weight to be given to the evidence. * * * *The part of the quotation from Labatt used by the appellee is perfectly consistent with what immediately precedes it, as set out above, of which former part we think the clear meaning is that averment of knowledge or of the existence of a state of facts from which knowledge would be inferred is necessary to show the duty of warning.* It must be borne in mind that the bone of contention here is not whether the master knew or should have known of the danger for of that the presumption is he had knowledge, but (underlying questions touching danger, and averment of negligence) is the question of duty. It is simply a question of averment necessary to show duty upon the breach of which when shown negligence may be predicable. Duty being shown—as we have stated above, and have frequently decided—general averments of negligence are sufficient. From what has preceded it is the judgment of the court that the court below committed reversible error in overruling the demurrer to

> the second count, which presents lack of averment (in that count) of knowledge on the part of the master, or that of Madden, of plaintiff's inexperience."

Chicago etc. Co. v. Hendrix, 87 N. E. 663, 667.

This was a general action against a railroad company and a clay works company for damages for personal injuries sustained by plaintiff, a minor, who was injured while acting in the employ of the latter company. The negligence charged against the defending employer was that he had failed to warn the plaintiff. In reversing a judgment in plaintiff's favor because of the error of the trial court in overruling defendant's demurrer to the complaint, for failure to allege that the employer was ignorant of the inexperience of the plaintiff, the court said:

> "Among the objections made to the complaint by appellant clayworks are the following: No facts are stated showing that appellant clayworks knew that appellee was ignorant of the threatened danger. It does not appear by direct averment that, if appellant had warned appellee that the railroad company had entered the yard with its engine and was intending to move the cars, appellee could have escaped the injury, nor that said clayworks had knowledge of the action of the railroad company in time to have warned appellee of the danger so as to have enabled him to escape the injury. These objections were, we think, well taken, and the court erred in overruling the demurrer of the appellant clayworks to the complaint."

Cumberland Tel. Co. v. Cosnahan, 62 So. 824, 826.

In that case it appeared that a telephone lineman was sent to discover defects in a telephone line. In climbing a pole his hand came in contact with a telephone wire against which an uninsulated power line belonging to another company had negligently been permitted to come in contact, thus electrocuting him. The court said:

> "The judgment against the telephone company must, however, be reversed, because of the errors committed by the court in granting several instructions requested by plaintiffs, which were not cured by any of the other instructions. These instructions, in effect, authorized the jury to find for the plaintiffs, in event they should believe from the evidence that Cosnahan's death was caused by his having come in contact with a telephone wire heavily charged with electricity, and which became so charged by reason of the negligence of the company. As we have heretofore stated, the company is liable, if at all, not by reason of negligence in permitting these wires to come in contact, but by reason of a failure to warn and instruct Cosnahan."

St. Louis etc. Co. v. Brantley, 53 So. 305, 308.

In the excerpt from the opinion sufficiently stating the facts of the case to show the application of the rule contended for, the court said:

> "The court below allowed the plaintiff to testify that he had never before helped to unload a machine out of a car. The distinct tendency of this evidence was to impute wrongdoing to the defendant or its superintendent

in failing to adapt and accommodate the degree of care exercised for plaintiff to his immaturity and inexperience. No such case was declared upon. Count 1 did not reach it.

Where the danger of the service is not concealed, but is open to a person of ordinary experience and observation, the master or his superintendent owes no duty to warn or instruct unless the servant is known to be inexperienced; that is, the master or his superintendent must know that the servant by reason of inexperience or immaturity is exposed to an abnormal hazard over and above those which he is presumed to contemplate as incidents of the employment for which he is engaged. The duty in the case put does not arise from the mere relation of master and servant—such duties as are alleged in the first count to have been breached—but from that relation plus a status of the servant which the master is not required to know. *If it is to be proved,* it must be alleged. Louisville & Nashville v. Wilson, 50 South. 188; Republic Iron & Steel Co. v. Williams, 53 South. 76. In this there was error, and for it a new trial should have been granted."

And see also the following cases:

Louft v. C. & J. Pyle Co., 75 Atl. 619;

Stuart v. West End etc., 40 N. E. 180;

McDermott v. Atchison etc., 43 Pac. 248;

Georgia etc. v. Miller, 16 S. E. 939;

Pearson v. Boston etc., 87 N. E. 571;

Cote v. Pingree Co., 91 N. E. 300;

Korsman v. Rice, 84 N. E. 311;

French v. First Avenue etc., 63 Pac. 1108;

Youll v. Sioux City etc., 23 N. W. 736.

It may be argued that the hazard in working near and around a lightning-arrester was increased on account of its alleged negligent construction and maintenance. This alleged negligence consisted in placing the live arms too near the ground, and in too close proximity to the transformer station. This was a mere condition.

To illustrate what we mean by the terms "condition" and "proximate cause":—

> "Suppose A takes passage from San Francisco for Sacramento by railroad; at Port Costa the train is wrecked, by the carelessness of the railroad company, and A is injured. The negligence, being the immediate cause of the injury, is said to be the proximate, the juridical, cause thereof.
>
> Again, suppose the same case, except that the train is wrecked without injury to A, who thereupon takes passage by steamer owned by B for the remainder of the journey; that by the negligence of B the steamer is wrecked and A is injured. In this last case the negligence of B becomes the proximate cause of such injury. True, but for the accident to the train the injury to A would not have occurred, for he would not have sought passage by steamboat, yet it was but a remote cause, a condition in the chain of causation which produced the result, and there could be no just cause for holding the railroad company liable.
>
> 'An act is the proximate cause of an event, when, in the natural order of things and under the circumstances, it would necessarily produce that event, when it is the first and direct power producing the result, the causa causans of the schoolmen.' (Beach on Contributory Negligence, sec. 10.)

> If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support the action." (Cooley on Torts, sec. 69.) (Bank of Savings v. Murfey, 68 Cal. 455, 462.)

Whether the construction was negligent or not it was there in plain view. The danger was the ordinary and obvious one of coming into contact with a live electric wire. It is not alleged that the live arms were so near the ground that they could not readily be seen. It is not alleged that they were not in plain view. Nothing is alleged which shows that the result to the employee would have been different if he had come into contact with the live arms if they had been farther from the ground.

The essence of the complaint is the act of *setting the employee at work*. If he had not been directed to work near and around the lightning-arrester it would have made no difference whether its construction was negligent or otherwise. This is evidently the theory upon which the complaint was framed because it is alleged "that said place was a *dangerous place in which to work* by reason of the defects alleged herein and by reason of the fact that the live arms of said lightning-arrester were so near the ground and in so close proximity to said substation building". That being so the employer's negligence, if any, consisted in failing to

perform his duty to furnish his employee a reasonably safe place to work; and as has been shown, working near and around live electric wires is a reasonably safe place to work where that is the employee's business. It would be absurd to require an employer under such circumstances to warn an experienced employee to *avoid live electric wires.* Many of the authorities hereinafter cited state that all adults, whether experienced or not, are presumed to have sufficient knowledge of electricity to avoid dangers of that kind, and that the obligation rests upon them to do so. If this be so with respect to inexperienced men of average capacity, how much stronger must be the rule with reference to men accustomed to work near and around live electric wires.

It is therefore respectfully submitted that the complaint fails to show any violation of duty on the part of defendant in error.

5. No facts are alleged showing a causal connection between the alleged negligence and the injury.

On this subject the complaint simply states that "by reason of said negligent and defective construction of said lightning-arrester, and by reason of its construction and maintenance at an unsafe and insufficient distance from the ground, and by reason of its nearness to said transformer house, and by reason of the dangerous place in which plaintiff was ordered to work and of receiving said

shock and charge of electricity plaintiff sustained a number of serious and grievous injuries", etc.

No *fact* is stated showing any proximate connection between the "said negligent and defective construction" and the employee's contact with or proximity to the live arm of the lightning-arrester. The employee simply "came" into contact with or proximity to the wire. *How* he "came" is not alleged. Neither is any *fact* set forth showing any proximate connection between its insufficient distance from the ground and the employee's contact with or proximity to the live arm. Nor is any *fact* set forth showing how its nearness to the transformer house had anything to do with the accident. Neither is it shown how the dangerous nature of the place was proximately concerned with the employee's contact with or proximity to the wire. From all that appears in the complaint to the contrary the employee deliberately went close to or came into actual contact with the wire. It is not even alleged that the employee did not know the wire was there or could not see it, or did not know that it was charged with electricity.

The rule is well settled that proximate causal connection between negligence and injury must be shown in the complaint by allegations of *fact*: Legal conclusions will not answer in such cases. The term "by reason of said negligence" and similar expressions have been held to be mere allegations of conclusions of law. The rule of pleading

is quite liberal with respect to allegations of negligence. Ordinarily, duty having been properly alleged, it is sufficient to allege the act or omission complained of and to add that it was *negligently* done or suffered. But the rule is quite strict as to the necessity of showing, by substantive averments of fact, a causal connection between the alleged negligence and the injury.

Smith v. Buttner, 90 Cal. 95.

In that case the complaint set forth that while plaintiffs were in possession as tenants of defendant's house, he raised it six or seven feet, but neglected to provide a suitable means of entrance to, or egress from the house, and that plaintiffs continued to reside in the house after it had been raised, and to pay rent as before, and that by reason of said negligence, the wife, one of the plaintiffs, in endeavoring to descend from the house to the ground, fell and was injured, but no *facts* were averred showing that the alleged negligence caused or contributed to the injury. It was held that the complaint did not state facts sufficient to constitute a cause of action, the court saying:

> "The negligence consisted simply in failing to provide a safe, proper and suitable means of entrance to, or egress from the house, and it is alleged that this negligence caused plaintiff to fall. But no fact is averred which shows that such negligence had anything to do with the accident. How did it cause her to fall? It may have been because defendant

neglected to provide any means of egress whatever, or through some patent defect in the plans of the contrivance, whatever it was. In such case, plaintiff could not recover in this action. (Sieber v. Blanc, 76 Cal. 173.) It may have been, consistently with this general statement, because the structure was insufficiently secured and therefore gave way, although properly used. In such case perhaps plaintiff might recover. Such complaint does not state the facts constituting plaintiff's cause of action. It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury. To illustrate, suppose a plaintiff injured by the fall of a sign negligently and insecurely fastened by defendant. It would not suffice for him to allege the negligence in hanging the sign; that plaintiff in lawfully, and without negligence passing under it was thrown down and injured through such negligence. This would be a mere assertion of the cause. It would be necessary to show that the sign fell upon him in consequence of such negligence, thereby causing his injury."

Billesbach v. Larkey, 12 Cal. App. Dec. 217.

This was an appeal from an order sustaining defendant's demurrer to plaintiff's complaint without leave to amend. The cause of action attempted to be stated was for negligently prescribing for the use of plaintiff a dangerous drug called heroin. It was held that the demurrer was properly sustained, the complaint not stating a cause of action because

no causal connection between the defendant's negligence and the plaintiff's injuries was alleged. The court said:

> "While it is settled that negligence may be charged in general terms, *it must appear from the facts averred that the negligence caused or contributed to the injury.* (Smith v. Buttner, 90 Cal. 96.) *The complaint must show a causal connection between the negligent acts and the injury.* * * *
>
> "Although negligence may be charged in general terms, it must appear from the facts averred that the negligence caused or contributed to the injury, and it is not sufficient merely to aver that the injury was caused by the negligence averred, if no fact is stated which shows how the injury was caused. (Smith v. Buttner, *supra.*)
>
> "In construing pleadings before judgment, it is presumed the pleader has stated his case in the most favorable manner to himself possible. (Smith v. Buttner, *supra.*) *As it does not appear from the facts averred that the negligence of the defendant caused any injury to plaintiff, the complaint states no cause of action.*
>
> "In coming to this conclusion we have not overlooked the general statement in the complaint, that by reason of said carelessness, negligence and unskillfulness on the part of the defendant, and by reason of the several premises, the plaintiff, Florence Billesbach, was made sick and injured in health and constitution, etc. In this regard the illustration used by Temple, C., in Smith v. Buttner is apt. It was there said: 'To illustrate, suppose a plaintiff injured by the falling of a sign negligently and insecurely fastened by defendant. It would not suffice for him to allege negligence in hanging the sign; that plaintiff, in lawfully

> and without negligence passing under it, was thrown down and injured through such negligence. This would be a mere assertion of the cause. It would be necessary to show that the sign fell upon him in consequence of such negligence, thereby causing his injury.' We apprehend that in such a case it is not only essential to allege that the sign fell upon the plaintiff in consequence of such negligence, but also in falling upon him it injured him.''

And see in this connection the Nevada case of *Whitten v. Nevada Power and Light Co.,* 132 Fed. 782, above quoted from.

Although it is alleged that the accident happened "by reason of" the alleged negligence of defendant, there is no fact set forth showing how any such negligence had any proximate connection with the injury. Therefore the complaint does not state facts sufficient to constitute a cause of action.

6. It is impossible to determine from the complaint whether the employee came into contact with the live wire or not. Likewise it cannot be determined whether he received his injury by coming into "close proximity" to the wire. The complaint simply avers that the accident happened in either one or the other of these two ways.

Certainty is one of the main requirements in pleading a cause of action. It will not do to allege that an accident may have happened in one of several different ways. Every defendant is entitled to know exactly how the plaintiff claims the accident happened. If it is permissible to allege that

the accident happened in one of two different ways, without specifying which, it is likewise permissible to allege that it happened in any number of different ways.

Patton v. Texas etc. Co., 179 U. S. 658, 663, 664.

This was an action by a locomotive fireman for damages for personal injuries sustained by him in the turning of a loose step on a locomotive while he was cleaning it at the end of his trip. It was admitted that the steps were suitable and in good condition at the beginning of the trip; that the inspectors at both ends of the trip were competent, and that the plaintiff undertook to clean the engine without waiting for regular inspection which would have undoubtedly led to the discovery and repair of the defect. A verdict was directed for the defendant and in affirming the judgment Mr. Justice Brewer said:

> "*And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.*"

At first thought it may appear that this point is of slight importance. But upon more mature consideration it will be clear that it is of vital import-

ance in this action. For instance, a child knows that *contact* with a live electric wire is dangerous. But the fact that electricity will *jump* from one point to another under certain circumstances is not so well known. Therefore, while any person of average intelligence would not be permitted to say that he did not know of the danger of coming into actual contact with a live wire, the rule may not be the same where actual contact is not relied on but where it is claimed that the electricity jumped from the wire to the body of the plaintiff. It will undoubtedly be urged in this action that even though the defendant in error must be charged with knowledge of the danger of contact with live electric wires, he is not so charged with knowledge of the danger of coming into close proximity thereto.

From this it is manifest that the complaint should have been certain in its averments in this regard. This is made the more apparent from the fact, as will appear later, that there is *no evidence* as to whether the plaintiff received his injuries by contact or otherwise; and that liability is sought to be fastened on the plaintiff in error by an equivocal allegation and by testimony from which either inference might, with equal propriety, be drawn.

The plaintiff in error insists that the obligation rested upon the defendant in error to allege and prove, not that the accident might have happened in either one of two ways, but that it did happen

in a certain definite way. Defendant was not present at the time and place of the accident but plaintiff was so present and should therefore have directly alleged and proven how his injuries were caused.

The defendant in error is in no position to complain if the complaint should be declared insufficient. It was demurred to and subsequently the points urged herein were presented to the court at the close of the case of defendant in error. The same objections to the complaint were again urged at the conclusion of the entire testimony. At that time the defendant in error asked permission to file an amended complaint, which was granted. On this subject counsel stated:

> "If your Honor please, since that matter has been settled, under that amendment we now ask to amend the fourth paragraph of our complaint by inserting therein an allegation *that the defendant knew that the plaintiff was inexperienced in electricity, and failed and neglected to warn or caution the plaintiff* at the time they sent him to work upon the arrester." (Record, page 546, fols. 730, 731, 732.)

Subsequently counsel asked permission to withdraw the amendments allowed, which permission was granted. On this subject counsel stated:

> "If your Honor please, I have made investigation of the subject respecting the amendment to the complaint, and I find two lines of authorities, one holding that amendment would make the complaint multifarious, and the other line of authorities that it would not; and I

> now request the court to be allowed to withdraw the amendment, and stand on the complaint as originally drawn." The court granted counsel's request. (Record, page 553, fol. 747.)

To use counsel's own language, they elected to "stand on the complaint as originally drawn". Therefore, as it clearly fails to state a cause of action defendant in error has no ground for complaint if this court so adjudges.

B.

THE EVIDENCE FAILS TO PROVE THE MATERIAL ALLEGATIONS OF THE COMPLAINT.

The motion of plaintiff in error for a peremptory instruction requiring and directing the jury to return a verdict for the defendant, sets forth in detail the particulars in which the evidence is insufficient to warrant the submission of the case to the jury. (Record, page 374, fols. 311 to 321.)

For the purpose of this brief, however, these specifications will be argued under four headings, to wit:

1. The evidence fails to establish the negligence alleged in the complaint, or any negligence on the part of plaintiff in error.

2. The evidence fails to show that there was any proximate causal connection between the negligence of plaintiff in error, if any, and the injuries suffered by defendant in error; but on the contrary the accident happened by reason of a separate

independent and intervening cause for which plaintiff in error was not responsible.

3. The evidence shows that the defendant in error assumed the risk of injury from the danger in question, and that therefore plaintiff in error is not responsible therefor.

4. The evidence shows that the defendant in error was guilty of contributory negligence.

1. *The evidence is insufficient to establish negligence on the part of plaintiff in error.*

It has already been shown that the complaint fails to set forth certain facts necessary to create a duty on the part of plaintiff in error. The evidence exhibits the same weakness.

An attempt was made to show that defendant in error was employed as a laborer only. This was met by the allegation in the complaint that he was employed as a "laborer and electrician's helper"; that the answer denies that he was employed as a laborer; and that it was therefore an *admitted fact* that he was employed as an electrician's helper.

The evidence very clearly shows that from April, 1911, up to July 18, 1911, the date of the accident, he actually worked in different capacities. Part of the time he worked as a laborer and received a laborer's pay of $4.00 per day; part of the time as an electrician's helper, receiving the usual pay of $4.00 per day therefor; and part of the time

as a *lineman,* receiving a lineman's pay of $4.50 per day. The evidence upon this point is not disputed because the pay checks issued to defendant in error and cashed by him are in evidence and show on their faces the character of his employment and his rate of wage.

The evidence therefore establishes, without conflict, that defendant in error was an *experienced* employee. It is true that his work was dangerous but so is the work of any experienced person working near and around live electric wires.

Not only did the pleadings admit that defendant in error was experienced, but his cross-examination exhibits beyond question, and without conflict, great and extended experience in several extremely dangerous lines of work. He gave his trade as "steam stationary engineer" (Record, page 99, fol. 3).

At different times he was employed in running engines, operating steam boilers, operating electric dynamos or generators, operating electric motors, constructing power lines, installing transformers and doing an indefinite number of other things in connection with electricity. He had also engaged in blasting with dynamite. He was a man of thorough experience in dangerous work of many different kinds. He was also a man of splendid physique, being six feet six inches tall and weighing over 200 pounds. Mentally he was far above the average in his walk of life.

When he accepted employment with plaintiff in error in April 1911, he was already experienced and thereafter until the happening of the accident he worked constantly with electricians and linemen and was constantly gaining knowledge and experience. On the day of the accident, therefore, he was a workman of much more than ordinary ability, capacity and competency, and one upon whom any employer might be entitled to rely to faithfully perform responsible and dangerous duties.

There is *no evidence* that defendant in error accepted employment as an *inexperienced* man, or claimed to be inexperienced, or that his method of work indicated inexperience. On the contrary, Mr. Halpenny, electrician for plaintiff in error, and the immediate superior of defendant in error, testified that he always regarded Sheaff as a superior workman and entirely competent.

It may be claimed that certain evidence as to declarations of Mr. Halpenny, offered for the sole purpose of impeaching him, is substantive evidence of knowledge on his part of Sheaff's inexperience. Certain witnesses were allowed to testify over the objections of plaintiff in error that Mr. Halpenny had expressed doubts of the propriety of his sending Sheaff to do the particular work he was performing when injured. Halpenny had testified that he regarded Sheaff as a thoroughly competent man. The purpose of these declarations was to impeach Halpenny with respect to that testimony.

That being so they can have no other effect. Impeaching testimony is not independent substantive testimony in a case but its only purpose and effect is to discount or weaken the testimony of a witness.

Keyes v. Geary Street etc., 93 Pac. 88;
People v. Davenport, 13 Cal. App. 632;
Worley v. Spreckels etc. Co., 125 Pac. 697.

It is quite apparent, therefore, that when Sheaff was ordered to do the particular work in question he was treated and entitled to be treated by his employer precisely the same as any other experienced and competent man would be treated. He was not told how to do the particular work assigned to him because it was presumed, nay known, that he knew how to do it. Neither was he warned (otherwise than by warning signs) with respect to the danger of contact with or proximity to live wires, because he was presumed to have sufficient knowledge on that subject.

Let us see, therefore, exactly what kind of work the plaintiff was doing when he was injured, the instructions that had been given him, and all of the circumstances surrounding the precise situation at the moment of the accident.

These facts are quite simple. The lightning-arrester had been completed for some time. It was enclosed by a wire fence. Upon the door of the substation there was a danger sign. On one of the switch posts within the enclosure where the lightning-arrester was situated there was a sign in plain

letters about two inches long, reading, "Danger—High Voltage—Keep Out." This sign was placed in such a position that it could readily be seen by anybody coming up the trail toward the substation, or by any one entering the enclosure at the point where Sheaff testifies he entered it.

The ground wires on the dead arms of the lightning-arrester were not satisfactory to Halpenny. They did not afford sufficient resistance. He therefore decided to place a concrete block under the end of each of the dead arms, place a metal clamp on each of the three blocks and connect the ground wires to each end of the concrete blocks. The blocks were to be partly buried, and it was necessary that holes should be dug for that purpose. The purpose of the concrete blocks was to furnish a greater resistance to any electric current that might pass through the dead arms of the lightning-arrester in case of any heavy surge on the high tension wires above.

About a week or so before the accident a similar lightning-arrester had been completed at the Wonder substation. It had been constructed by Halpenny with the assistance of Sheaff. Similar concrete blocks had been placed under the dead arms of that lightning-arrester. Sheaff made the blocks, dug the holes, and assisted in placing them. On the night before the accident Halpenny directed Sheaff to go to the Fairview station and do the same kind of work on the lightning-arrester there that he had just finished doing on the lightning-arrester at

Wonder. In other words, he was to dig holes under the three dead arms of the lightning-arrester, place therein the three concrete blocks which he (Sheaff) had already made and taken with him to Fairview, and to attach the clamps thereto, which had been ordered made by the blacksmith at the mine near the station. With reference to his instructions Sheaff testified as follows:

> "When I was sent over there I was told to get some clamps made and to dig some holes and put some concrete blocks into them. These concrete blocks were made of sand and cement. I made them in Wonder and they were about eight inches square and about two feet long. I was told where to dig the holes by Mr. Halpenny. He said, dig the holes under the lightning-arrester, *right plumb under the arms nearest the switch.* There were six arms of the lightning-arrester. I received that instruction in Wonder." (Record, fols. 23, 24, page 107.)

On cross-examination Sheaff testified on the same subject:

> "I don't remember Mr. Halpenny telling me to use a plumb line. I don't think he did tell me then to attach anything to that pipe. *He told me to dig the holes under the arms. He said the side nearest the switch.* I understood him by the arm to mean the ends of those pipes sticking up there. I think he did use the word 'arm'. I don't think he did use the word 'horn'. In telling me to dig the holes I don't remember just what the exact words used were, whether he said under the horn or under the arm or under the pipe. He said to dig them on the side nearest the switch. *I could not be positive that he did not say the dead side.* He told me to dig the holes underneath the arms. I don't know

how I happened to dig it underneath the point of the arm. Possibly he had told me to dig it under the point. *As near as I can tell you he told me to dig those holes under the arms nearest the switch.* I don't remember of his telling me to dig them under the point. I happened to dig them under the point because I presume that is where he wanted them. I don't know how I happened to presume that is where he wanted them. *I guess it was because I knew of my own knowledge and experience where they ought to be dug. I had done that same work on the Wonder lightning-arrester, and I had dug those holes on the Wonder lightning-arrester, and had assisted in placing the concrete blocks at the Wonder arrester. I guess that was how I came to know how to do that work. I had done that work at the Wonder substation under the direction and under the instructions of Mr. Halpenny, with Mr. Halpenny right there telling me how to do it. When I had finished that work at the Wonder substation, I knew how to do that thing, and when I was instructed by Mr. Halpenny to go over there and do that work, I knew how to do the work I was assigned to do. I knew where to place the holes."* (Records, fols. 249-253, pages 192-194.)

The enclosure where Sheaff was set to work was only dangerous to one coming within an inch and three-quarters of the live arms of the lightning-arrester. Every other part of the enclosure was perfectly safe. The work Sheaff was ordered to do was on the *dead* side of the lightning-arrester, probably about four feet from the live arms. The dead arms and part of the framework of the lightning-arrester were between the point where his work

was to be done and the live arms. In order to come into contact with or close proximity to the live arms he would be obliged to leave his place of work and go to the part of the enclosure where he had not been ordered to go and where he had no work to do.

It appears without conflict that he was ordered, upon finishing the work assigned to him, to do nothing more but wait until Mr. Halpenny came the next day. Mr. Halpenny was to do the wiring and Sheaff was ordered by Halpenny to let the wires alone. There is some slight difference in this respect, not amounting to a conflict, between the testimony of Sheaff and Halpenny. Sheaff says that he does not remember of Halpenny's saying anything to him about the wiring. He does not state, however, that Halpenny ordered him to do any work on the wires whatever. Halpenny, on the other hand, testifies that he told Sheaff not to touch the wiring because he would be over the next day to do that part of the work.

There was a plain and safe way of ingress and egress to the point where Sheaff's work was to be done. He could have entered the enclosure, done his work and left the enclosure without going nearer a live wire than about four feet. Even if he had remained but *two inches* from the live arms he would not have been injured. It appears without contradiction that electricity of the voltage then carried could not jump more than one and three-quarters inches under the most favorable conditions, and a man's body is not a good conductor. Some

part of a man's body would have to go within one and three-quarters of an inch of the live arm before any injury could occur.

The case, therefore, resolves itself to this: *An experienced man was ordered to do work which was in itself perfectly safe; work that he had done before under the eye of his superior and under practically the same conditions; and work which he acknowledged he understood perfectly well how to do. To do this work he was obliged to enter an enclosure where there was a dangerous contrivance. He acknowledges he knew the danger of coming into contact with live electric wires. The wires in question were not concealed but were in perfectly plain view. At the point where he entered the enclosure there was staring him in the face a danger sign reading,* "DANGER—HIGH VOLTAGE—KEEP OUT." *The audible purring of the transformers spoke and in a loud voice said: "These wires are charged with electricity." He could have gone to his work, done it and left the enclosure without going near the live wires.*

Under such circumstances what DUTY *did the employer violate in sending him to do that particular work?*

We have searched the books in vain to find any case holding a master guilty of negligence under such circumstances. Although the complaint contains no allegation of a lack of warning this *experienced* employee was actually warned by the danger sign and by the purring of the transformers as well.

Moreover, at the Wonder lightning-arrester, which he assisted in building, he had actually painted the danger sign which was placed upon that substation.

Although it seems too plain for argument that the master was guilty of no negligence, a few apposite cases will, out of an abundance of caution, be cited.

Looney v. Metropolitan R. Co., 200 U. S. 480;
Andrews v. Valley Ice Co., 167 Cal. 11, 20, 21;
Felton v. Girardy, 104 Fed. 127;
Kohn v. McNulta, 147 U. S. 238;
Tuttle v. Detroit etc. Co., 122 U. S. 189;
Blick v. Olds Motor Works, 141 N. W. 680;
Dunbar v. Hollingsworth etc. Co., 84 Atl. 992, 994.

It must be conceded by defendant in error that the side of the enclosure nearest the switch, the place to which defendant in error was assigned to work, was a place entirely safe. Defendant in error was not therefore set to work in a dangerous place. There was neither allegation nor proof that plaintiff in error had knowledge or was chargeable with notice that defendant in error would go to a part of the enclosure wherein he had no work to do and wherein, it must be assumed, he realized the only source of danger lay.

The rule that the master must furnish his servant a reasonably safe place to work does not extend beyond the place where the master has knowledge, or is chargeable with knowledge, that the servant may be expected to go in performance of his duties.

This is so well settled as to require no citation of authority.

The case last cited, *Dunbar v. Hollingsworth etc. Co.*, 84 Atl. 292, 294, is so extremely apposite as to justify extended quotation. The court said:

> "*So far as the 'safe place to work' rule is concerned, it need only be said that it is not applicable to the situation in this case. That danger was lurking in the charged electric wires is true. Yet the place, to one who knew and appreciated the danger, and used the degree of care which was requisite to the situation, that is to say, due care under the existing circumstances, was 'safe', as the word is used in the master and servant rule.* Besides, but for the guy wire, the witnesses all agree that the plaintiff's work was not dangerous. The pole which the plaintiff climbed was dry. Dry wood is practically a nonconductor of electricity. The plaintiff might have rested upon the cross-arm, or upon the pole, and touched the live wire without harm, unless he was in contact with some conductor. The guy wire was a conductor. It was the presence of the guy wire which created the danger. But work has to be done at times in dangerous places. If the workman knows and appreciates the danger, or if by the exercise of reasonable care he would have known and appreciated it, he is held to have assumed the risk of danger. Caven v. Granite Co., 99 Me. 285, 59 Atl. 285. *And this rule has especial force in a case where the dangerous risk lies in the voluntary movements of the workman himself, movements which he can control, and for which he is responsible. When the place to work is itself dangerous, the master is absolved from liability, if the workman knew and appreciated the danger, or should have done so.* And this leads to a consideration of

the other alleged ground of negligence, the failure to instruct the plaintiff as to the danger.

If the servant knows and appreciates the danger, instruction is not necessary. If the servant does not know and appreciate the danger, and would not have known it by the exercise of due care, as if the danger is not obvious, and the servant is inexperienced, it is the duty of the master to give him suitable warning of the danger. But in this respect the duty is not absolute. As in the case of furnishing safe and suitable appliances, or a safe place to work, the master is bound to use due care. He is held to no more. Negligence, or want of due care, is the basis of the action. If he uses due care, he does all that the law requires. Cowett v. American Woolen Company, 97 Me. 543, 55 Atl. 494. The care of the master must be equal to the emergency, and must be determined by the conduct of ordinarily prudent men, under like circumstances. Snowdal v. United Box Board & Paper Co., 100 Me. 300, 61 Atl. 683. But this need not be considered further, for we think that the case clearly shows that the plaintiff knew and appreciated the danger, and hence that instructions were unnecessary. He was a mature and intelligent mechanic. *In this age of the world, it is not unreasonable to impute to intelligent men some knowledge that contact with wires carrying a voltage* of 2,200 volts is, or is likely to be, dangerous. For such a man to say otherwise is unbelievable."

In considering this phase of the case we have treated the evidence from its most favorable aspect to the defendant in error. The facts relied upon were developed by the testimony of defendant in error and his own witnesses, principally by

Sheaff himself. We have avoided all questions as to which there is any conflict and have relied only on such facts as are binding upon the defendant in error.

It is therefore most respectfully submitted that the evidence utterly fails to show any negligence on the part of defendant in error.

2. *The evidence fails to show that there was any proximate causal connection between the negligence of plaintiff in error, if any, and the injuries suffered by defendant in error; but on the contrary the accident happened by reason of a separate, independent, intervening cause for which plaintiff in error was not responsible.*

On this subject it will be unnecessary to discuss the evidence at length. One of the charges of negligence is that the lightning-arrester was built too close to the substation. There is no evidence to show that this charge is true, but even if it were there is no evidence to show that the space between the lightning-arrester and the substation had anything to do with the accident. According to his own testimony Sheaff was not between the live arms of the lightning-arrester and the substation when he was injured. At his last moment of consciousness he was north of the lightning-arrester and walking toward the substation. He had not entered the space between the lightning-arrester and the substation. Therefore, there is a total ab-

sence of causal connection between that charge of negligence and the injury.

Likewise there is a lack of causal connection between the other charge of negligence and the injury. It is claimed that the plaintiff in error was negligent in placing the lightning-arrester too close to the ground. Assuming this to be true it amounts only to a condition. A lightning-arrester is dangerous wherever it is placed. It cannot be insulated. If a workman is required to work in its vicinity it is dangerous even if it is above the ground, on the ground, or under the ground. The important fact is not that the place was dangerous, because it had to be so under the best possible conditions. The fact of sending an employee to work in a dangerous place is the important thing.

It appears, as already shown, that the employee was sent to work in a safe place, and that his means of access to and egress from his place of work were also safe. Therefore the accident did not occur by anything *proximately connected* with his work or his orders respecting that work. We must look to another proximate cause for the accident itself.

What was that cause? After the third hole was dug Sheaff, instead of leaving the enclosure by the route he had entered it, elected to leave it by a different route which would take him between the live arms of the lightning-arrester and the substation. According to his own admission, with this idea in view, he "wandered" between the live arms and

the substation "without thinking", and in some manner, he does not know how, came either in contact with or so close to a live arm of the lightning-arrester that he was injured.

Under such circumstances we consider that the only possible inference deducible from the evidence is that the immediate, proximate, separate, independent and intervening cause of his accident was his own voluntary act in unthinkingly and unnecessarily attempting to leave the enclosure by a dangerous route when there was a perfectly safe one open to him.

Morris v. Duluth etc. Co., 108 Fed. 747, 749 (and cases cited).

3. *The evidence shows that the defendant in error assumed the risk of injury from the danger in question and that therefore plaintiff in error is not responsible therefor.*

The facts already adverted to are sufficient to establish this proposition. Sheaff was an experienced employee. He was ordered to do plain, simple, safe work which he fully understood. In doing the work he was not *necessarily* in any danger. Danger of any sort was about four feet from him. He was presumed, as an electrician's helper, to have known sufficient of electricity to have been able to avoid such danger. He did actually know of the danger of coming into contact with live electric wires. He had before him a warning that

the enclosure he entered was a danger zone. He knew that the current was on the wires and heard the purring of the transformers that very morning. He knew that the purring meant that the electricity was passing through the transformers.

The District Court held that from Sheaff's act in attaching a plumb-line to the dead arms the jury might infer inexperience or ignorance of danger. The court's point was that if a surge had occurred even the dead arms would be dangerous. But the court evidently did not have in mind the fact upon which all the experts agreed, that even under those circumstances there would be no danger from the dead arms. The current would pass to the ground through the ground wires—the line of least resistance. Even during a surge the dead arms could have been handled without injury. Of this Sheaff was probably aware.

The particular point of danger in the enclosure was not hidden. The live arms of the lightning-arrester were in plain view and their connections with the high tension wires above were also in plain view. To get near the live wires he had to leave his place of work and go into a part of the enclosure where he had no duty to perform.

Under these circumstances we submit that he assumed the risk of injury to himself.

Dunbar v. Hollingsworth etc. Co., 84 Atl. 992, 994.

4. *The evidence shows that the defendant in error was guilty of contributory negligence.*

The rule on this question is applicable alike to experienced and inexperienced adults. Of course it bears more strongly upon experienced men, but it is undoubtedly the law that all men of average intelligence must be conclusively presumed to know enough to avoid open, apparent and patent dangers. Such dangers every adult of average intelligence must use ordinary care to avoid. If he fails to do so and his failure in that respect proximately contributes to his injury, he cannot recover even if his employer is also guilty of negligence.

It will require but a meager recital of the facts existing at the time of the accident to demonstrate Sheaff's gross negligence. In the first place he had been working for years at dangerous employments; he had been working about electric wires and near live wires for months; he had assisted in constructing two lightning-arresters; he had assisted in installing transformers in two substations; he had actually constructed a power line, doing all the wiring himself and being in charge of the entire work; he was present when the power was turned into the substation at which he was injured. At the time of his injury he knew that power had been passing through those high tension wires, through the transformers into the substation, through other transformers belonging to the mining company, and that it was being used at the mine.

On the morning of the accident he went into the substation upon the door of which there was a danger sign. While there he heard the purring of the transformers, indicating that the current was passing through the substation. He was well acquainted with that sound and knew what it meant. He went to the rear of the substation and there found an enclosure within which was the lightning-arrester. On one of the switch-posts near the lightning-arrester, and facing him, was a danger sign reading, "DANGER—HIGH VOLTAGE—KEEP OUT." He removed the staples fastening the wires of the enclosure to the substation and entered. He says he did not see the danger sign, but it was his duty to see it if he was not already aware of the danger. (*Moore on Facts,* Vol. I, Sec. 191; *Chicago etc. R. Co.,* 139 Fed. 65, 71.) The enclosure itself, having no gateway or entrance, was a sign of danger. He had painted the danger sign to be placed on the lightning-arrester at Wonder. This alone was sufficient to charge him with knowledge of the danger of such a contrivance. He went to his place of work by a perfectly safe route. He did his work in a perfectly safe place. He could have left his place of work by the same route. Instead of doing so, with the transformers purring in his ears, and the connections between the live arms of the lightning-arrester and the high tension wires in plain view, he elected to leave the enclosure by a different route which would take him between the live arms of the lightning-arrester and the substation, making it

necessary for him to come within probably a foot of the live arms. Under these circumstances he "wandered" toward the substation "without thinking". Just how or where he received his injury the evidence does not disclose, although the burden was upon the defendant in error to establish that fact. The burden of the defendant in error was to establish negligence and causal connection. But from the mark on the point of the northerly arm of the lightning-arrester the inference may be drawn that he came into contact with or within an inch and three-quarters of that point and that an arc was formed between that point and his body allowing the current to pass through his body to the ground. *It is therefore quite apparent from the evidence that he must have* WANDERED WITHOUT THINKING *to a point within an inch and three-quarters of the end of the northerly arm of the lightning-arrester.* In no other manner could the injury have occurred. There is no evidence of an unusual surge on the line. There was no lightning and there were no unusual conditions existing on that morning. It was a beautiful day. If there had been a surge the electricity could not have jumped more than four and one-half inches and formed an arc with his body. Before doing so it would have chosen a route of less resistance, namely, viz., jumped across from the live arms to the dead arms. So that it is demonstrated that even if there was a surge on the wire Sheaff must have been within four and one-half inches of the tip of the northerly

arm. According to his own testimony he wandered there without thinking. He thus negligently placed himself, without the exercise of any care whatsoever on his part, in a fearfully dangerous position and, of course, was injured.

If Sheaff *had used any care at all* a question of fact for the jury to determine might have arisen as to whether such care constituted "ordinary care", but it would be very difficult for a jury to determine that absolute want of care constitutes ordinary care. Where an injured person admits that he wandered without thinking toward a plain, open, obvious and patent danger it must be concluded as matter of law that he exercises no care at all. And if the performance of his duty required him to go into that position and, with his mind full of his duties, he was injured unthinkingly there might be some shadow of excuse for his action; but his duties did not require him to go near the live arms of the lightning-arrester at all. And the rule is well established that where there is a safe means of ingress and egress to an employee's place of work, the employee is bound to use that route rather than a dangerous one. If he voluntarily uses the dangerous one and is injured he is guilty of contributory negligence (see cases hereinafter cited).

From our point of view the plaintiff in error is no more responsible for Sheaff's injury in this case than if he had been injured on the way to Fairview by coming in contact with a live electric wire. There is even less responsibility on the plaintiff in error

here because Sheaff was warned both by the enclosure itself and by the danger sign, that the enclosure was a danger zone.

Of course the defense of contributory negligence involves negligence on the part of the employer and we are arguing this question on the assumption that such negligence existed; but we do not wish to be understood as making any such admission. On the contrary, we consider the testimony full and complete to the effect that the lightning-arrester itself was properly constructed. It was a standard form of lightning-arrester used by many power companies in the west. There was no standard rule requiring it to be placed in any particular position. There is evidence that it would be more dangerous for an employee to work above the ground than near the ground. There is conflicting *opinion evidence,* however, on the subject. Sheaff's witnesses testify that it should have been constructed a greater distance from the ground. The witnesses for defendant in error state that its construction near the ground within an enclosure and plainly labeled with a danger sign was safer, so far as employees were concerned, than if built a greater distance from the ground. So far as third parties were concerned it did not matter that it was built near the ground because that was a desert country and very few people were in the neighborhood. Furthermore, the substation and lightning-arrester were built on the extreme top of a hill—an isolated place.

It is possible, however, that the evidence is sufficient to raise a question of fact for the jury as to whether the lightning-arrester was built too close to the ground or not. But if so we have shown, not only that there was no causal connection between such negligence (if it can be so termed) and Sheaff's injury, but that his own negligence certainly contributed proximately to his injury. If this be true there is no question but that he was guilty of contributory negligence and cannot recover.

> "We have stated elsewhere that objects plainly visible are presumed to have been seen. A parallel presumption exists in respect to sounds." (*Moore on Facts,* Vol. I, Sec. 191, and cases cited. See also *Chicago etc. Ry. Co. v. Andrews,* 139 Fed. 65, 71.)

For further support of the proposition that plaintiff was guilty of contributory negligence as a matter of law, see the following cases:

Looney v. Duluth etc. Co., 200 U. S. 480;
Andrews v. Valley Ice Co., 167 Cal. 11, 20, 21;
Dunbar v. Hollingsworth Co., 84 Cal. 992, 994;
Morris v. Duluth etc. Co., 108 Fed. 747, 749.

III.

The District Court erred in refusing to give to the jury the following instruction:

> "You are instructed that the only cause of action, which the plaintiff is entitled to have

submitted to you for consideration, is based upon the charge that the defendant sent the plaintiff to work at a place which was not reasonably safe in view of the unusual or extraordinary risks incident thereto, if any there were.

"You are, therefore, further instructed that if you find from the evidence that the place to which plaintiff was sent to work was a reasonably safe place, as the expression or term is hereinafter defined, your verdict must be in favor of the defendant, Pacific Power Company." (Record fols. 808, 809, pages 576, 577.)

The purpose of this instruction was to limit the jury, in considering the evidence, to the charge that defendant in error was negligently ordered to work in a place which was not reasonably safe. The complaint charged negligence in the construction and maintenance of the lightning-arrester. As already shown, it is our contention that such negligence, if any, had no proximate connection with the injury; that the essence of the cause of action, if any, was negligence in ordering defendant in error to work in a place which was not reasonably safe, without warning or instruction. Negligence in the construction of the lightning-arrester had nothing to do with the injury at all. If there was any actionable negligence it was the act of the plaintiff in error in sending the defendant in error to work near and around the lightning-arrester in its then position, whether constructed negligently or otherwise.

The refusal of the court to give this instruction as proposed left it to the jury to determine that negligence in the construction of the lightning-arrester would authorize a verdict against the plaintiff in error even though such negligence were completely "insulated" (to borrow a word employed by a Federal Judge) from the injury.

This instruction was given in a qualified and limited form (fol. 769). The qualification was error. There was no allegation in the complaint as to the company's knowledge of Sheaff's inexperience, and that question should not have been submitted to the jury.

IV.

The District Court erred in refusing to give the following instruction:

> "The complaint does not allege that the plaintiff was unfamiliar with or ignorant of the ordinary duties of an electrician's helper, and does not allege that the plaintiff was ignorant of the ordinary risks and dangers of his employment as an electrician's helper. You are, therefore, instructed that it must be taken as an admitted fact in this case, so far as the charges of negligence against the defendant are concerned, that the plaintiff was familiar with the ordinary duties of an electrician's helper and comprehended all of the usual and ordinary risks and dangers attending the said employment." (Record fols. 810, page 577.)

The complaint does not allege that the defendant in error was ignorant of the ordinary duties of an electrician's helper, or of the ordinary risks and dangers of his employment as an electrician's helper. That being the case plaintiff in error was entitled to have the jury instructed that it must be taken as an admitted fact that the defendant in error was familiar with the ordinary duties of an electrician's helper, and that he must be held to have comprehended all of the usual and ordinary risks and dangers attending that employment. The instruction undoubtedly states the law and, in our opinion, should have been given as proposed. The court's qualification thereof (fol. 792) was error. (See authorities heretofore cited.)

V.

The District Court erred in refusing to give the following instruction:

> "The complaint does not allege that the plaintiff was unacquainted with or ignorant of all of the dangers incident to the work of a journeyman lineman and electrician, but does state that the plaintiff was unacquainted with and ignorant of the dangers incident to the work of a journeyman lineman and electrician upon and near the wires or apparatus carrying electric current of high voltage and potential energy. You are instructed, therefore, that in so far as the charges of negligence against the defendant are concerned, it must be taken as an admitted fact in the case that the plaintiff

> was acquainted with and not ignorant of any of the dangers incident to the work of a journeyman lineman and electrician, excepting upon or near wires or apparatus carrying electric current of high voltage and potential energy. As to all other matters relating to such duties and dangers he must be deemed, in so far as negligence against the defendant is concerned, to have had knowledge of such dangers." (Record fols. 812, 813, page 578.)

The complaint in this case is quite peculiar in this, that while it alleges that the defendant in error was employed as a laborer and electrician's helper, it contains no allegation to the effect that he was ignorant of the dangers incident to that employment. It does state, however, that he was ignorant of *certain* of the dangers incident to the work of a journeyman lineman and electrician. That being the case the plaintiff in error was entitled to have the jury instructed on that subject so that the extent of the knowledge of the defendant in error on the subject of electricity, as admitted by the pleadings, might be fully understood.

VI.

The District Court erred in refusing to give the following instruction:

> "The complaint, as amended, charges as one of the alleged defects of the lightning-arrester that it was placed or constructed too close to the substation building. You are instructed that the evidence fails to sustain this charge,

and you will, therefore, ignore it in arriving at your verdict." (Record fol. 814, page 579.)

There is no evidence to show that the lightning-arrester was constructed too close to the substation building. Neither is there any evidence showing that any such defective construction was even remotely connected with the accident. It is not contended that the defendant in error was injured by going between the lightning-arrester and the substation building. He was undoubtedly injured on the northerly side of the lightning-arrester and before entering the space between the lightning-arrester and the substation building. As there was no possible liability on that ground the jury should have been instructed that the evidence failed to sustain that charge of negligence.

VII.

The District Court erred in refusing to give the following instruction:

"Certain evidence has been admitted in this case with respect to the question as to whether or not the defendant warned the plaintiff as to the dangers attending the work, upon which he was engaged at the time of the accident, if any, and whether the defendant instructed him as to how to avoid such danger. In this connection you are instructed that the complaint does not set forth any cause of action against the defendant based upon any alleged failure of the defendant to give the plaintiff any such warning or instruction, and you cannot, there-

fore, find the defendant guilty of negligence on that ground." (Record fol. 815, page 579.)

Of course there can be no recovery upon any cause of action not set forth in the complaint. Evidence was allowed to be introduced upon the question of warning and instruction and it was therefore necessary that the court would limit the application of such evidence to the case actually made by the complaint. It cannot be denied that the complaint contains no allegation at all on the subject of warning or instruction. Therefore, in order to make entirely clear the issues of fact before the jury it was necessary, in our opinion, that this instruction should be given.

It clearly states the law and confines the jury to the precise issues made by the pleadings.

VIII.

The District Court erred in refusing to give the following instruction:

"Although the place to which an employee is sent to work may be actually dangerous, it may, notwithstanding, be a reasonably safe place to work within the meaning of the law relating to the duty of an employer toward his employees. Some occupations are essentially dangerous, and some places where employees are obliged to work are essentially dangerous, but it does not follow that an employer is negligent in sending an employee to work in such dangerous place. Dangerous work, such as

working about electricity, is lawful and must be done. Therefore, an employer has a right to set an employee at such work or to direct him to work in a dangerous place, and an adult employee, who accepts such work, takes upon himself the risk of the ordinary dangers incident thereto. The greater the risk and danger of the particular work or the particular place, the greater is the risk which the employee assumes. It is only concealed and latent dangers, or dangers of which he does not or should not know and appreciate the risk, for which the employee does not assume the responsibility. Therefore, if an employee is sent to work in a dangerous place, but the dangers, even though great, are open, plain and obvious and such as are or should be known to an adult person of ordinary intelligence and capacity, such place is under the law a reasonably safe place to work, and the employer is not responsible for any injury that may be sustained by the employee through or by reason of such dangers." (Record fol. 818, pages 580 to 584.)

The greater part of the foregoing instruction was given but the court refused to give the following:

"If an employee is sent to work in a dangerous place, but the dangers, even though great, are open, plain and obvious and such as are or should be known to an adult person of ordinary intelligence and capacity, such place is under the law a reasonably safe place to work."

Of this part of the instruction the court said, in the presence of the jury:

"I cannot, as a matter of law, instruct the jury that a dangerous place, no matter how dangerous it is, and how unnecessarily dangerous it is, is a safe place to work, if the servant knows and appreciates the danger."

In refusing the foregoing part of the instruction, and in its comments thereon, we think the court committed grievous error. The law, as we understand it, is that even though danger is great, if the servant knows and appreciates it, or if it is so open, plain and obvious that it should be known to an adult person of ordinary intelligence and capacity, he assumes the risk of it and the place, within the rule, is reasonably safe.

Dunbar v. Hollingsworth etc. Co., 84 Atl. 992, 994.

IX.

The District Court erred in refusing to give the following instruction:

> "If you find that the defendant sent the plaintiff to work in a place which was actually dangerous, but the danger thereof was open and appreciated by him, I instruct you that the place to which he was sent was reasonably safe, and his employer cannot be held responsible for injuries suffered by him through or on account of such dangers." (Record fol. 826, page 584.)

The substance of this instruction is that if the defendant in error appreciated the dangers of his employment, and that they were plain and open, his employer was not responsible for setting him at work. The cases heretofore cited demonstrate that this is the law.

X.

The District Court erred in refusing to give the following instruction:

> "You are instructed that the danger attending the employment of the plaintiff at the time of his injury was open, patent and obvious and such as should have been known and appreciated by an adult person of ordinary intelligence, experience and capacity. This being so he assumed all the risks thereof, and your verdict must, therefore, be in favor of the defendant." (Record fol. 827, page 584.)

This instruction clearly states the law. If the danger attending the employment of the defendant in error was open, patent and obvious and such as should have been known and appreciated by an adult person of ordinary intelligence and capacity, he assumed the risk and the plaintiff in error was entitled to a verdict. Plaintiff in error was entitled, in our judgment, to have the jury instructed in this concrete and definite form.

CONCLUSION.

When Lee Campbell, one of Sheaff's witnesses, was asked whether he knew the purring sound of transformers, he said: "You bet I have heard that purring sound on the transformers frequently. It is a peculiar sound—*just like a rattlesnake.*" This suggests an illustration with which we desire to close this brief:

Suppose a corporation is constructing a telegraph line through a country infested with rattlesnakes. An adult employee of average intelligence is set to work to dig a hole for a telegraph pole in a coppice or thicket enclosed by a substantial fence. His instructions are to dig the hole at a particular place. While climbing the fence there is plainly before his eyes a sign reading:

"Danger—Rattlesnakes Within This Enclosure —Look Out."

He proceeds by a route where there happens to be no underbrush to the point where the hole is to be dug. He digs it and then starts to wander unthinkingly about the thicket. He hears the rattling of the rattlesnakes but pays no attention and wanders on in the direction from whence the sound comes, and is bitten by a rattlesnake.

How does this illustration apply to the present case? The warning is the same, the necessity for taking down or climbing the fence to enter is the same, the safe passage to a point where the work was to be done is the same, the opportunity to leave the thicket by the same route he entered is the same, the rattling of the reptiles is analogous to the purr of the transformers which he heard, and the wandering unthinkingly into the danger is the same.

We must not forget that plaintiff was not sent to do *electrical* work. His work on that particular morning was laborer's or helper's work. But he carried with him in doing that work all of the knowl-

edge he had gained in an experience of years in many dangerous employments, including electricity.

The live wire bore the same relation to his work as did the reptile in the illustration. The defendant in error should have avoided the live wire precisely the same as the laborer should have avoided the reptile.

Viewed from any reasonable standpoint we feel that the defendant in error is not entitled to recover any damages from the plaintiff in error and therefore request a reversal of the judgment appealed from.

Dated, San Francisco,
September 25, 1915.

Respectfully submitted,

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